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EXTRAORDINARY ORIGINAL JURISDICTION

APPELLATE CIVIL

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directed and controlled, it was non-resident for the purposes of the Act and consequently not liable to pay tax.

The Excess Profits Tax Officer rejected these contentions and assessed the petitioner for the first, second, third and fourth C.A.Ps. to a profit of Rs. 1,254;1,02,818;1,92,698 and 1,78,967 respectively. The petitioner thereafter preferred an appeal to the Deputy Commissioner and after its rejection filed a revision before the Commissioner against the assessment order and alternatively prayed that the following questions may be referred to the High Court:

(1) Whether in the circumstances of this case the assessee can be held to be carrying on business within the meaning of s. 2 (4) of Excess Profits Tax Act?

(2) Whether in the circumstances and facts of this case the assessee is not merely an employee remunerated for services?

(3) Whether in the circumstances of this case the income and earnings of the assessee do not accrue or arise outside the Nizam's Dominions and therefore, not liable to tax?

(4) Whether the earnings and income of the assessee do not accrue or arise out of the services rendered by the assessee in Secunderabad?

(5) Whether the remuneration payable to the petitioners is not dependent on the contracts effected in Secunderabad by the petitioners?

The Commissioner rejected the revision petition and upheld the findings of the authorities below; but with respect to the alternate prayer for referring questions formulated by the petitioner to the High Court, the Commissioner was of the view that inasmuch as questions 1 and 2 were questions of fact, no point of law was involved. With respect to questions 3 to 5, although he agreed that these questions involved a point of law, he considered that the questions as framed by the petitioner were not clear and did not bring out the specific point of law intended to be raised; consequently, he formulated the aforesaid questions for consideration of the High Court.

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...it the p.int of law intended to
...bject of the reference appears to
... to where the profits of the petitioner
... and whether the petitioner is liable to assess-
...ne Act. It is always open to the High Court,
... raising new and different questions, to resettle or
...me the questions before answering them so as to bring
...ut the real issue between the parties. The petitioner's
question No. 3 did frame the issue on those lines. In our
view, the question as formulated by the Commissioner may
be reframed as under:

> "Whether on the facts and in the circumstances of the case the profits made by the assessee on its business as the sole selling sub-agents of the Azamjahi Mills Ltd., and Osmanshahi Mills Ltd., have accrued or arose within the territory of H.E.H. the Nizam's Dominions and is the assessee liable to tax under Hyderabad Excess Profits Tax Act?

It is clear from the statement of the case and the documents annexed thereto that under the agreement the petitioner is bound to assist in the making of the contract of sale in yarn and cloth between the mills and the dealers, guarantee such sales, be responsible for the fulfilment of the said contracts when made, and be liable for and bear any loss or damage arising out of the failure to perform the whole or any part of the contract. In consideration for these services the petitioner is entitled to discount on the net value of the invoices as well as to one half of the discount allowed in respect of contracts made through them on direct sale of yarn and cloth by the companies. The Commissioner and Income-tax authorities took the view that because the contracts are concluded in H. E. H. the Nizam's Dominions, goods are delivered there and moneys paid there, the commission or discount due to the petitioner accrued in H. E. H. the Nizam's Dominions. In order to determine this point it will be necessary to examine sub-s. (1) of s. 5 of the Act which is as under: -

> "5. (1) Save as hereinafter provided, this Act shall apply
>
> (a) to every business wherever carried on the profits of which accrue or arise to a person resident and

ordinarily resident in His Exalted Highness the Nizam's Dominions, or

(b) to every business of which any part of the profits accrue or arise or deemed under the provisions of this Act to accrue or arise in His Exalted Highness the Nizam's Dominions to a person not resident in His Exalted Highness the Nizam's Dominions, or

(c) to every business carried on and controlled in His Exalted Highness the Nizam's Dominions or in any part of India the profits of which accrue or arise to a person resident but not ordinarily resident in His Exalted Highness the Nizam's Dominions;

Provided that where the profits of a part only of a business carried on by a person who is not resident in His Exalted Highness the Nizam's Dominions or not ordinarily so resident accrue or arise in His Exalted Highness the Nizam's Dominions or are deemed under the provisions of this Ordinance so as to accrue or arise, then, except where the business being the business of a person who is resident but not ordinarily resident in His Exalted Highness the Nizam's Dominions is controlled in India, this Act shall apply only to such part of the business, and such part shall for all the purposes of this Act be deemed to be a separate business.

Provided further that this Act shall not apply to any business the whole of the profits of which accrue or arise in British India; and where the profits of a part of a business accrue or arise in British India, such part shall, for the purposes of this provision, be deemed to be a separate business the whole of the profits of which accrue or arise in British India and the other part of the business shall, for all the purposes of this Act, be deemed to be a separate business."

This sub-section has been drafted so as to incorporate the provisions of s. 5 of the Indian Excess Profits Tax Act together with ss. 4, 4-A and 4-B of the Indian Income-Tax Act. The two provisos, however, correspond to provisos 2 and 3 of s. 5 of the Indian Excess Profits Tax Act, while clause (c) of sub-s. (1) of the Act incorporates the effect of the first proviso in positive terms making the

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Act applicable in the same way as the proviso does negatively to the business of a person who is a resident but not ordinarily resident if the profits accrue in H E H. the Nizam's Dominions. The aforesaid sub-section of the Act broadly lays down two criteria for determining the liability of a person carrying on business to excess profits tax. The first is the chargeability of the profits of any part of the business in the same manner as under the Indian Income-Tax Act which is inextricably mixed up with the distinction between ordinary residents, persons not ordinarily residents and non-residents. The second is, whether the profits accrue in whole or in part in H.E.H. the Nizam's Dominions. Before the effect of the section can be considered it is necessary to determine (a) whether the profits of the whole business or part only of the business accrue or arise in Hyderabad; and (b) whether the whole of the profits accrue or arise outside Hyderabad. Admittedly, the assessee is a non-resident and before he could be held liable to tax it is, as we have said, necessary to determine the place where the profits accrued or arose, that is, whether in H.E.H. the Nizam's Dominions or in Secunderabad which did not then form a part of the taxable territories.

In the recent case of the *Anglo-French Textile Co., Ltd.*, v. *The Commissioner of Income-tax, Madras*, 1954, S.C.J. 76, their Lordships of the Supreme Court observed that the question whether a particular part of the income, profits or gains arose or accrued within taxable territories or without taxable territories would have to be decided having regard to the general principles as to where the income, profits or gains could be said to arise or accrue. In that case, the position taken by the Income-tax Officer that it was settled law that profits arose in the country in which the sales took place was rejected. Their Lordships observed at p. 82:

> " . . . . This argument was possible when the decisions which held that income, profits or gains arose or accrued at the places where the sales took place were good law, because then there was no question of apportionment of income, profits or gains arising from the business operations carried on in taxable territories and income, profits or gains arising from business operations carried on without taxable territories. The moment however it was held, as it

was done in the *Commissioner of Income-tax, Bombay v. Ahmedbhai Umarbhai & Co., Bombay*, that though profits may not be realised until a manufactured article was sold, profits were not wholly made by the act of sale and did not necessarily accrue at the place of sale and to the extent profits were attributable to the manufacturing operations profits accrued at the place where business operations were carried on, these decisions went by the board."

There appears to have been some confusion in the minds of the Income-tax authorities that the place where the petitioner's commission accrues or arises is directly related to the place where the goods are subsequently deliverable under the petitioner's arrangements. From the facts stated, it appears to us clear that the petitioner acquired the right to commission when it by its efforts brought the dealers and the mills into a contractual relationship and guaranteed the performance of the contracts of the dealers to purchase the goods. If the goods have been delivered and the moneys have not been realised or some conditions of the contract have not been fulfilled, the petitioner will be liable under the guarantee to any damage which the company mays uffer due to a breach of the agreement. The activities of the dealers qua the company and the place of their activity, that is, the place where the goods are sold or delivered or the money realised, or the contract fulfilled etc., should not be confused with the activities of the assessee.

It is contended by the learned advocate for the petitioner that since the entire activity of the assessee took place in Secunderabad, viz., entering into contracts, forwarding them to the mills and guaranteeing their performance, the profits accrued there are not in the taxable territories. Learned advocate for the Income-tax Department, on the other hand, submits by a reference to two cases, viz., *in re: Messrs. Hiralal Kalyanmal and another*, XI (1943) I.T.R. 128; and *Hira Mills Ltd. Cawnpur* v. *Income-tax Officer, Cawnpur*, 1946 I.T.R. 417, that the profits of the commission agent accrue at the place where the goods are sold. Neither of the cases cited by him really assist him. In the first case the assesssee who was the selling agents of Textile Mills at Indore, had entered into an agreement with the mill, whereby the assesseees were to be paid by the mill a commission of one per cent.

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on the gross sale proceeds of all the cloth of the mill and the commission was to be due to them on the 31st of December every year and was to be paid immediately thereafter. The assessee had a shop at Bompay and another at Indore. Sales were effected in Indore, being on terms F.O.R. Indore to Bombay merchants and the purchase moneys were received in the form of hundis drawn by the assessee through their Indore shop and accepted by the Bombay purchasers. The hundis were collected and after realisation were paid to the company in Indore by the assessee in Bombay and the commission was thus ultimately paid outside British India. The income-tax authorities held that the source of the commission was the receipt of the proceeds of sale on which the commission was calculated and therefore, the commission accrued or arose was received in British India. The Bombay High Court held that it was the sale and not the receipt of the sale proceeds which was the real source of the commission and as the sale took place in Indore even though the proceeds of the sale were received in Bombay, the Commission did not accrue or arise, nor was it received, in British India within the meaning of s. 4 (1). Apart from the question whether a general principle was laid down, namely, that the place where the sales took place is the place where the commission accrued about which the Supreme Court has in its latest pronouncement expressed a contrary opinion that judgment was in favour of the assessee. Kania, J., (as he then was) dealing with the argument that the receipt of the sale proceeds would determine the place of receipt of the commission observed at p. 140:

> " . . . . This contention is unsound The receipts of the sale proceeds at a particular place is not stated to be a part of the contract between the Mill Company and the merchants. The accident, therefore, of the sale proceeds being received in Bombay cannot make the source of the income in Bombay . . . . The underlying assumption that the receipt of the sale proceeds is a source, in my opinion, is unjustified. The commission had to be calculated on the amount of the sale proceeds. It was payable however only after the end of the year. Therefore, the receipt of the sale proceeds does not give rise to the accrual of the income in British India."

Mills case also, the decision was in favour of who was himself a seller. The question in s whether the profits and gains derived from de from Ujjain were profits deemed to have risen within the meaning of s. 42 (1) of the ne-tax Act. It was found that the brokers ere brokers, and so far at least as the assessee ed, were at liberty to place the orders obtained ere they willed. The brokers were in no sense gaged by the assessee. The assessee had gency or establishment of its own in British rs of purchases obtained by the brokers were Ujjain, goods were sold f. o. r. Ujjain and the aid for at Ujjain. On these facts, it was held fits and gains accruing or arising to the non- ssee as a result of sales in British India did r arise through or from business connection in a. The question here is not whether the profits rued or arose from a business connection in the meaning of s. 42 (1) of the Indian Income- was pointed out in the Anglo-French Textile case by the Supreme Court, which observed the Indian Income-tax Act has no relevance mination of the question whether a particular income accrued within taxable territories or able territories because it is mainly concerned which is deemed to have arisen or accrued income which actually arises or accrues within itories.

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ars to us that the facts in the present case are milar to those in *Commissioner of Income-tax*, v. *Steel Brothers & Co., Ltd.*, 1931 Cal. 162. , the assessee company was the managing agent Company. These companies were incorporated d Kingdom and had their offices in London. greement entered into between the assessee and pany in London, the assessee was entitled to a uneration or commission for the sale of goods on behalf of the oil company. This agreement uently modified under which the assessee was the remuneration for goods sold for the oil any agent or sub-agent. The modified agree- r stated that the commission payable to the s for its supervision, control and general advice e assessee was not entitled to the commission

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except where the oil company did in fact receive the sale proceeds of the goods. By two subsequent agreements the assessee agreed to part with its exclusive agency for disposal of certain products of the oil compay and consented to the Burmah Oil Co. being appointed the exclusive agents for disposal of the oil company's other products. But the commission payable to the assessee on sales even after Burmah Oil Co. had become the sole selling agent of the oil company remained unaffected. In the assessment years in question the products of the oil company were manufactured in India, the business processes were carried out in India and the sales by the Burmah Oil Company took place in India. The question arose whether the commission received by the assessee from the oil company on sales of oil manufactured by the oil company and sold by the Burmah Oil Company accrued or arose in India within the meaning of s. 4 (1) of the Indian Income-tax Act, 1922. The assessee was treated as a non-resident company. It was held that the assessee's remuneration could not be said to have accrued or arisen in India within the meaning of s. 4 (1) because the remuneration was attributable mainly to the supervision and control it exercises from London and it did not earn the income by selling the goods.

The assessee in this case, as has been observed, merely utilised its energies in Secunderabad in procuring contracts for the purchase of goods of its principal and guaranteed the performance of the contract. It was entitled to a commission though to a lesser extent even with respect to direct sales made by the company without reference to it as in the Steel Brothers case. The whole of its activity was confined to Secunderabad although the dealers purchased the goods in Hyderabad, from the company. In these circumstances, in our view, the profits of the assessee cannot be deemed to have accrued or arisen in H.E.H. the Nizam's Dominions but in Secunderabad which is not a taxable territory and being a non-resident, the assessee is not liable to be taxed under the Act. In this view of the matter, our answer to the reference is in the negative. The assessee will be entitled to costs which we fix at Rs. 250.

Answered accordingly

APPELLATE CIVIL

Before Mr. Lakshmi Shankar Misra, Chief Justice and Mr. Justice P. Jagannmohan Reddy

GANPATSA .. .. .. PETITIONER[1]

v.

HASNUDDIN AND OTHERS .. .. RESPONDENTS

Constitution of India, art. 227—Scope—Decision of Debt Conciliation Board—Absence of jurisdiction and contravention of s. 22 of the Debt Conciliation Act—Liability to be quashed.

Held, that the power of superintendence which art. 227, Constitution of India, confers is an extraordinary one intended to be used only in exceptional cases and is not a substitute for ordinary revisional or appellate powers. It is a power which is incidental to the duty cast upon the High Court to keep all courts and tribunals within the bounds of their authority and to see that they do what their duty requires them to do in a manner authorised by law. In other words, the High Court has a power to correct flagrant violation of the elementary principles of justice and manifest errors of law patent on the face of the record or a gross miscarriage of justice calling for a remedy or where there has been grave dereliction of duty for which no other remedy is available. But though the superior superintendence involves all these things, the High Court will not convert itself into a court of appeal or revision over the decisions of inferior tribunals for the purpose of correcting errors of facts or errors of law under art. 227 in case where the law entrusts the tribunals with sole or final authority to deal with them.

In the present case, the Debt Conciliation Board did not make any efforts to bring about a conciliation between the debtor and the creditor nor has the debtor made any offer which the creditor can be said to have refused. The Board have not directed its attention to the very important provision of s. 22 of the Debt Conciliation Act and, therefore, can be said to have been guilty of grave dereliction of duty. The action of the Board in moving the higher authorities for attachment of the properties for possession being given to the debtor is also without jurisdiction because the only power it has to pass an order of attachment is under s. 10 of the Act in the event of the creditor not filing his accounts and statements within the period prescribed therein. But in this case accounts were filed by the creditor within time. In these circumstances, the view that the debt was settled was wholly wrong and the Board failed to exercise its jurisdiction in the manner provided by s. 22 and acted without jurisdiction in directing delivery of possession to the debtor and, therefore, its decisions are liable to be quashed.

[1] Civil Revision Petitions Nos. 284 of 1951-52 and 294 of 1952-53

22nd October 1954

Ganpatsa
v.
Hasnuddin

L. S. Misra, C. J.
&
P. J. Reddy, J.

Civil Procedure Code, s. 115—Revision against the order of the Debt Conciliation Board after the advent of the Constitution of India—Maintainability.

Revision under s. 115, C.P.C, against the order of the Debt Conciliation Board, cannot be entertained by the High Court after the advent of the Constitution of India in exercise of itsextraordinary powers under the provisions of the Charter declaring High Court as exercising the powers of His Exalted Highness

Ramchander Rao Nandapurkar, Advocate for Petitioner.
.. .. .. for Respondents.

ORDER

P. JAGANMOHAN REDDY, J.—These two revision applications are directed against three orders of the Debt Conciliation Board (hereinafter called 'the Board') dated 18th September, 1950, 29th September, 1950 and 5th November, 1951. The two applications purported to be under s. 115, C.P.C., and art. 227 of the Constitution but since the Board is not a court subordinate to the High Court and s. 115, C.P.C., has no application, the applicant's learned counsel argued them as applications for revisions under art. 227 of the Constitution only. The case out of which they arise is an old one and has come up before this Court more than once. The facts in so far as they are relevant for the disposal of this application are that on the 20th Dai, 1343-F., Ganpatsa, petitioner (decree-holder), obtained a decree from the Munsiff's Court against Hasnuddin and Amiruddin. On 7th Ardibehest, 1343-F., the decree-holder presented an execution petition which was rejected on 16th Meher, 1343-F., for default of prosecution and the execution petition being again presented on 1st Farwardi, 1344 F., the court ordered the delivery of possession to the decree-holder on the 2nd Ardibehest, 1344-F., and the decree-holder obtained possession on 16th Thir, 1344-F. on condition that he will be entitled to the possession thereof as long as the amount due was not paid.

On 23rd Ardibehest, 1352-F., Hasnuddin respondent-1 and Amiruddin, the father of respondent No. 2, applied to the Board under the Hyderabad Debt Conciliation Act I of 1349-F. for restoration of possession on the ground that the amount of the debt has already been discharged. A notice was thereupon issued to the decree-holder who was

asked to produce the accounts. The decree holder produced the accounts on 24th Amardad, 1352 F., 7th Sherwar, 1352-F. and 30th Aban, 1352-F. with the allegation that the judgment debtors still owe Rs. 5000/- and he cannot therefore be dispossessed. On the 30th Aban, 1352-F. the Board held that the accounts were not filed within the time, nor were steps taken to get the preliminary decree made absolute. For these reasons the Board declared that the debt was discharged. Against this order the decree-holder (petitioner) came up in revision to this Court and a Division Bench of the Court by its order dated 9th Ardibehest, 1358 F. entertained the petition on the strength of *Erabadrappa* v. *Sheikh Abdul Rahim*, 33 D.L.R. 413 (F.B.) under the general power of superintendence over all judicial tribunals vested in it by the Charter and directed a fresh enquiry by the Board as in its opinion it was not justified in rejecting the creditor's case on the ground that the accounts were not submitted in time.

When the case went back to the Debt Conciliation Board, the Board ordered further accounts to be filed and this order was complied with on 14th April, 1950. On 16-8-1950, the Board appointed a Commissioner to look into the accounts on 11-9-1950, it appeared that the Commissioner had filed his report. From the same proceedings sheet, it would also appear that the Board was under the impression that the High Court had considered the statements of accounts filed by the petitioner to be unsatisfactory and in the circumstances it ordered the petitioner to file further accounts pertaining to the period after the decree. From the proceedings sheet of 18-9-1950, it would appear that the petitioner had not filed these further accounts and as a consequence the Board was of the view that possession of the lands should be restored to the judgment-debtors who were very poor. It, therefore, directed attachment of the said lands and for the order being communicated to the higher authorities for compliance. On the 29th September, 1950, the Board observed that the matter had been settled or concluded and that the case was a fit one to be consigned to records. Against these two orders, the petitioner filed a revision petition No. 28/4 of 1951 in this High Court and obtained a stay of the order to attach properties on 9-5-1951. On the 5th November, 1951, the Board again, after observing that it is a very old case and after considering the report of the Commissioner

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and the accounts filed by the petitioner, held that the respondent had discharged the debt and consequently directed that the previous order for restoring possession of the lands to the judgment-debtors be carried out and the superior authorities be addressed to comply with it. Against this order also the petitioner filed a revision petition No. 249/4 of 1952. Both these revisions are now before us. The respondents have not appeared and the proceedings are ex-parte against them.

The learned advocate for the petitioner contends that the orders of the Board dated 18th and 29th September, 1950 and 5th November, 1951 are contrary to the provisions of the Debt Conciliation Act and were without jurisdiction. Section 25 of the Debt Conciliation Act lays down that no appeal or application for revision shall lie against any order of the Board except in two cases which are not applicable to the facts of the case. We may at the very outset observe that the decision in *Erabadrappa* v. *Shaikh Abdur Rahim*, 33 Dec.L.R. 413 (F. B.), which laid down that revisions against the orders of the Debt Conciliation Board could be entertained by the High Court in exercise of its extraordinary powers under the provisions of the Charter declaring the High Court as exercising the powers of His Exalted Highness is no longer valid after the 26th January, 1950 when India became a Republic. We must, therefore, confine ourselves to arts. 226 and 227 of the Constitution. Admittedly, the petitioner has not filed an application for the issue of any of the writs and the remedy provided for under art. 226 of the Constitution is not open to him.

It has to be seen whether this petition will come under art. 227 of the Constitution which confers on the High Court the power of superintendence over all courts and tribunals. The power which art. 227 confers is an extraordinary one intended to be used only in exceptional cases and is not a substitute for ordinary revisional or appellate powers. It is a power which is incidental to the duty cast upon the High Court to keep all courts and tribunals within the bounds of their authority and to see that they do what their duty requires them to do in a manner authorised by law. In other words, the High Court has a power to correct flagrant violation of the elementary principles of justice and manifest errors of law patent on the face of the record or a gross miscarriage of

justice calling for a remedy or where there has been grave dereliction of duty for which no other remedy is available. But though the superior superintendence involves all these things, the High Court will not convert itself into a court of appeal or revision over the decisions of inferior tribunals for the purpose of correcting errors of facts or errors of law under art. 227 in cases where the law entrusts the tribunals with sole or final authority to deal with them.

For determination of the question whether this is a fit case for interference under art. 227, it is necessary to see what powers were possessed by the Board under the Hyderabad Debt Conciliation Act. Under sub-s. (1) of s. 4, a debtor or a creditor as defined in sub-s. (5) and sub-s. (6) of s. 2 may make an application to the Board within the territorial limits of which the debtor ordinarily resides or holds or cultivates lands requesting for a settlement to be made between the debtor and his creditors. No application, however, shall be made by the debtor holding or cultivating land paying more than five hundred rupees annual land revenue or holding such land of sovereign grant or a jagir on which revenue exceeding one hundred and twenty-five rupees is assessed or may be assessed. Sections 5 and 6 provide for the verification of the application and the particulars to be stated therein and the procedure to be adopted on receipt thereof. Section 8 confers powers on the Board to dismiss the application in certain cases. An English translation of ss 9 and 10 is as under:

> "9. (1) On receipt of application under s. 4, if the Board accepts the application by holding it within the jurisdiction or rejects it for having no jurisdiction, the debtor or the creditor may, within thirty days from the date of notice of such order, submit to the Board, in writing, his pleas against such acceptance or dismissal.
>
> (2) In case of submission of pleas under sub-s. (1) the Board shall decide them and such decision shall be final.
>
> (3) If the pleas have not been submitted under sub-s. (1) or have been submitted and decided under sub-s. (2) the jurisdiction of the Board shall not be questionable in any civil court.

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10. (1) After recording the statement of the debtor on the date fixed under s. 7 the Board shall serve and publish a notice in the manner prescribed to the effect that every creditor of the debtor shall submit by the appointed date, a statement relating to the debts recoverable by him. The date to be appointed for the submission of statements shall not be within one month from the date of service and publication of the notice. If the creditor satisfies the Board that he was, for sufficient cause, unable to submit the required statements before the appointed date, the Board may give further time therefor.

(2) Every debt pertaining to which a statement has not been submitted in compliance with the provisions of sub-s. (1) shall be deemed for all purposes and objects to have been paid and the Board may move the Taluqdar to take possession of the land which may be in the possession of the creditor in respect of such debt and to make temporary arrangements for cultivation for the season immediately following the move. If within three months from the date of the Taluqdar's so taking possession of the land the creditor makes an application attaching the statement provided for in sub-s. (1) to the Debt Conciliation Board or, in case of the Board being abolished, to a civil court and satisfies that the notice was not served on him or that he had no knowledge of the publication thereof or that, for emergent or unavoidable cause, he was unable to comply with the provisions of sub-s. (1), the Board or the Court shall not deem his debt to have been paid and shall direct the Taluqdar to restore the possession of the land to the creditor forthwith if there is no crop on the land and after harvest if there be a crop.

(3) If in accordance with sub-s. (2), the creditor does not, within three months, satisfy the Debt Conciliation Board or in case of its being abolished, the civil court by submitting an application or such application has been submitted and rejected, the Taluqdar shall, after the expiration of the aforesaid period at the instance of the Board or the Court or on an application of the debtor or of his own accord after due satisfaction restore the possession of the land to the debtor."

Section 11 provides for the procedure for submission of statements of debts, accounts, documents, etc., and the effect of non-production of any of the documents which are not in possession of the creditors. Section 12 provides that the Board shall in respect of each debt hear parties thereto and induce them to arrive at a decision by mutual settlement. It further provides that, after hearing the parties and considering the evidence adduced, the Board shall look into the account of each debt for the previous 12 years from the date of application and shall determine the principal and the arrears of interest payable thereon. In doing so, the decree of the civil court shall be deemed to be conclusive as to the amount of the debt decreed which may be reduced in case of a settlement under s. 14. The determination by the Board of the principal and arrears of interest payable on account of debt due from a debtor shall not be called in question in any civil court in any manner other than provided for in the Act. Section 13 deals with powers of the Board to summon persons, production of documents and to record evidence. Section 14 provides that if the debtors and the creditors or the debtor and any of the creditors agree to come to a settlement, the Board shall without delay reduce to writing, read out and explain such settlement to the parties concerned and signatures of the parties who have agreed to the settlement shall be obtained thereupon. Thereafter, the agreement recording the amount receivable by each creditor, the manner of the payment and the time thereof shall be drawn up accordingly and signed by the President of the Board. This section further prescribes the nature of the terms which should be embodied in the agreement. It is unnecessary for us to state these terms or the provisions of ss. 15 to 21 which are not relevant for the purpose of this application. Section 22, which is important, provides by sub-s. 1 that the Board shall grant a certificate in the prescribed form in respect of debts owed to a creditor, if during the hearing of any application under s. 4 it becomes evident that any creditor does not agree to a mutual settlement and the Board is of opinion that the debtor made an offer which the creditor ought to have accepted in view of its reasonableness. In order to decide whether the offer is fair or otherwise, the member is empowered to take certain matters into consideration in addition to others, viz., rise or fall in value of the land, its produce in the locality from the date of receiving the loan to the time of making the offer, the consideration actually received by the debtor,

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the reasonableness of the rate of interest, the onerous conditions of loan and the readiness expressed by the creditor or the debtor at any time for settlement of the debt or any part thereof and the terms of such settlement. sub-s. 2 provides that when a creditor sues in a civil court for the recovery of a debt in respect of which a certificate has been granted under sub-s. 1, the court shall notwithstanding the provisions of any law for the time being in force, neither allow the plaintiff after the date of granting the certificate any interest in excess of simple interest at six per cent of the principle amount as determined under sub-s. 2 of s. 12 nor shall allow the costs.

From the above brief survey of the Act, it is clear that what the Board is empowered to do on an application being filed by the debtor is to make an attempt to bring a conciliation between the debtor and the creditor and if the debtor's offer is not accepted to grant a certificate to him under s. 22 setting out therein its reasons for holding that the debtors' offer was a fair settlement of his liability. In all the three orders under revision which have been mentioned above, the Board did not make any efforts to bring about a conciliation between the debtor and the creditor, nor has the debtor made any offer which the creditor can be said to have refused. Further, the Board has not directed its attention to the very important provision of s. 22 and therefore can be said to have been guilty of grave dereliction of duty. The action of the Board in moving the higher authorities for attachment of the properties for possession being given to the debtor is also without jurisdiction because the only power it has to pass an order of attachment is under s. 10 of the Act in the event of the creditor not filing his accounts and statements within the period prescribed therein. It is clear from the High Court's order of 9th Ardibehest, 1358 F. that the accounts were filed by the creditor within time and that the view of the Board that the creditor failed to carry out his statutory obligation in this behalf was not correct. The order of the Board dated 5th November, 1951, would show that after the remand further accounts were filed. In these circumstances, we are satisfied that the view that the debt was settled was wholly wrong and the Board failed to exercise its jurisdiction in the manner provided by s. 22 and acted without jurisdiction in directing delivery of possession to the debtor. Both the revision-applications must therefore be allowed with costs. We order accordingly, quash

the decisions of the Debt Conciliation Board dated 18-9-50, 29-9-50 and 5-11-50 and direct that the case be proceeded with according to law.

Revisions allowed.

EXTRAORDINARY ORIGINAL JURISDICTION

Before Mr. Justice Syed Qamar Hasan

A. NARAYAN PERSHAD .. .. PETITIONER[1]

v.

THE STATE OF HYDERABAD AND OTHERS .. RESPONDENTS

Endowments' Regulation (Dastur-ul-Amal), Hyderabad, s. 12—Powers of mutawalli—Rules 11 and 58 of the Regulation—Conflict with the provisions of the Regulation and in excess of the rule-making powers of the authority—Validity—Orders of the Hon'ble Minister, Ecclesiastical Department directing de novo enquiry regarding succession to tawliat and imposition of a committee of his choice—Whether in excess of jurisdiction—Liability to be quashed by means of a writ of certiorari.

The petitioner was appointed as a *mutawalli* under a deed of endowment with powers to constitute a committee to aid and assist him in the discharge of his duties. The applicant after the death of the previous *mutawalli*, communicated the same to the Commissioner of Endowments who on 20-3-1953 recognized him as *mutawalli* and directed him to appoint a committee as required by the deed of endowment. But, subsequently, the Hon'ble Minister-in-charge of the Ecclesiastical Department ordered a *de novo* inquiry regarding the succession to mutawalliship and imposed a committee of his own choice for management of the endowment. The petitioner applied for a writ of *certiorari* to quash the said orders of the Hon'ble Minister on the ground of want of jurisdiction to pass the impugned orders.

Held, that s. 12 of the Hyderabad Endowments' Regulation provides that the mutawalli shall be competent to exercise all the powers conferred upon him by the author of the *waqf* and in case a *mutawalli* is found to be incompetent to function as such, the Minister-in-charge of the Ecclesiastical Department in order to secure a better management of the endowed property may frame rules for his guidance or appoint a superintendent under the rules. It is evident from s. 12 that it did not contemplate the fulfilment of any condition precedent on the part of the *mutawalli* to enable him to enter upon the duties of his office. The only condition imposed was that he should discharge

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his duties in conformity with the wishes, directions and instructions of the author of the endowment. The Minister was permitted to intervene only in those cases where the *mutawalli* failed to act according to the wishes of the author of the endowment and mismanaged. Even then, he could frame rules for the guidance of the mutawalli or take over the management and have it administered by a mumtazim.

Rules 47 and 58, which have been made under the rule-making authority given under s. 16 of the Regulation not only make a departure from the general law of endowments but make provisions repugnant to the guiding principle of s 12 of the Regulation, by imposing a condition precedent and substituting the satisfaction as to fitness in place of the choice given to the existing *mutawalli* or *wakif*. The necessity as to the successor's fitness is a clear deprivation of the right of nomination and it was not within the contemplation of the framers of the Regulation at the time when they enacted s. 12 thereof. Section 16 expressly requires that the rules should be consistent with and not repugnant to the Regulation. It is a well settled canon of interpretation that if reconciliation were found to be impossible between the section and the rules made thereunder and the latter is found to be in excess of the statutory power authorising them, the subordinate provision, as the rules framed happen to be, must give way and the position of the rules in excess of statutory power are found to be invalid as being *ultra vires* of the rule-making power.

In this view of the matter, the orders of the Hon'ble Minister directing a *de novo* inquiry into the question of succession of the mutawalliship and the imposition of a committee of his own choice are without any jurisdiction and are liable to be quashed by issue of writ of *certiorari*.

Constitution of India, art. 226—Issue of writ of certiorari—Existence of an alternative remedy—Whether a bar—Submission to the jurisdiction of the authority—Subsequent repudiation of the decision—Maintainability.

Where the authority whose decision has been challenged has acted without legal authority of law and without any jurisdiction or in excess of jurisdiction, the powers of the High Court to quash the order by issue of writ of *certiorari* is not fettered by the existence of an alternative remedy to the petitioner.

The remedy by way of prerogative writs is now statutory albeit a constitutional remedy and the supreme legislature of the land has not imposed any limitations on the plain terms of art. 226. The power to issue a writ in the nature of *certiorari* in appropriate cases and in appropriate manner is not circumscribed by the procedural technicalities of these writs in English law. Thus, where the applicant objected to the jurisdiction before the authority which he was entitled to do and it was overruled, he suffered from usurpation of jurisdiction and a writ of *certiorari* could be issued if it appeared on the face of the order that there had been a wrongful exercise of jurisdiction.

Latchmanan Chettiar v. *The Commissioner, Corporation of Madras*, *A.I.R. 1927 Mad. 130.*

Chela Narayya v. Joint Registrar [illegible] Society, Hyderabad, I.L.R. 1951 Hyd. 689. Narayan Pershad v. The State of Hyderabad

Rahimunnissa v. The State of Hyderabad, I.L.R. 1951 Hyd. 612.

Emperor v. Bankatram Lachiram, I.L.R. 28 Bom. 533 Qamar Hasan, J.

T. G. Bisappa v. T. Nagappa, A.I.R. 1954 S.C. 440.

Re v. Richmond, Governing Authority, (1921) 1 K.B. 248.

Manachal v. Nazim, Ecclesiastical Department, A.I.R. 1950 Hyd. 1, discussed.

A. Ramaswamy Iyengar
B. C. Jain
Jagachari } *Advocates* for Petitioner.

Gopalrao Tuljapurkar, Govt. Advocate for Respondent No. 1.

Vinayak Rao Vaidya
Sadashiv Rao } *Advocates* for Respondent No. 2.

JUDGMENT

SYED QAMAR HASAN, J:--This petition on behalf of Narayan Pershad seeking redress under art. 226 of the Constitution of India against the State of Hyderabad and Hari Kishen Singh comes before me under s. 8 of the Hyderabad High Court Act on a difference of opinion between my learned brothers Mohd. Ahmed Ansari and A. Srinivasachari, JJ.

The facts which have led up to the present petition briefly stated are that one Tulja Singh, intending to construct a dharmasala at Kachiguda and a home for disabled persons at Sadashivpet, deposited a sum of Rs. 1,25,000 with the then Government of Hyderabad on its concurrence that the amount deposited would carry interest at 5 per cent per annum.

In order to the constitution of the *wakf*, he executed a document which he termed as *dastur-ul-Amal* and wherein he embodied an elaborate scheme as to how the proposed buildings were to be constructed and as to how the income accruing from the interest was to be applied for the objects of dedication and maintenance and up-keep of the endowment. In addition to these arrangements, by cl. 13 of the said deed, he appointed himself as the first *mutawalli* for life and further directed that after his death the *tauliat* would devolve in his family on persons who may be the *wasi* of the previous *mutawalli* whom he enjoined to

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appoint a committee of not less than five persons to assist and aid them in the discharge of their duties.

The deed of dedication was submitted to the officer in charge of the Ecclesiastical Department and was duly accepted and registered on 10th Aban 1329 F. (15th September 1920). On 29th Azur 1333 F. (15th September 1923), he presented an application to the Secretary, Ecclesiastical Department, to be referred to hereinafter as the Department, informing him that he had, in the exercise of his powers under the deed of 10th Aban 1329 F., appointed Bala Pershad his executor and *mutawalli*. The Secretary by his letter No. 626 dated 22nd Bahman 1333 F. (26th December 1923) acknowledged the application and accorded sanction to the appointment.

After the death of the donor in 1336 F., Bala Pershad functioned as such without let or hindrance until his death in August 1952. During the tenure of his *tawliat*, it is said that the dharmashala as well as the home for the disabled were constructed and completed with the addition of his personal income. Under the impression that this element had necessitated a fresh dedication, he executed on 25th February 1950, another *wakfnama* which was registered by the Department on 11th September, 1950.

Feeling his end approaching, Bala Pershad at first nominated as his successor to the *tawliat* his younger son Lakshmi Narayan Pershad but by a later will of 6th August 1951, he cancelled the nomination and appointed his elder son, the present applicant to succeed him as the *mutawalli*. After the death of Bala Pershad on 30th August 1952, the petitioner, purporting to act under r. 81, Endowment Rules 1355 F., submitted a petition to the Department intimating the fact of the death of the incumbent *mutawalli* and requesting that he be recognized as the succeeding *mutawalli*. A notification dated 14th November 1952 prescribing the two month's statutory period for the intervenors and objectors to come in was duly issued and duly published in the Hyderabad Government Gazette of 17th November 1952. As a result of the said Notification, Lakshmi Narayan Pershad, the younger son of Bala Pershad, whose nomination has been cancelled intervened during the statutory period. The intervenor and the petitioner compromised and the Nazim (Commissioner) of Endowments, on the evidence of Bhojraj and Keshav

Singh, granted the petition and directed him to appoint a committee as required by the deed of endowment through his letter No. 778 dated 20th March 1953.

During the pendency of the inquiry, it would appear that the Revenue Board by its letter No. 1210 dated 7th March 1953 directed the appointment of a committee to manage and administer the affairs of the endowments in accordance with the wishes of its author. The appellant being advised of the proposal approached the Minister-in-charge of the Ecclesiastical Department through his application of 12th March 1953 and requested that the idea of the proposed committee be dropped and the accumulated income be handed over to him to be spent on the object of the *wakf* and for his personal use in terms of the deed of endowment executed by Bala Pershad. The Hon'ble Minister by his order of the even date rejected the plea for superseding the proposed committee but agreed to payment of the accumulated income to the applicant on condition that he spends it according to the directions contained in Tulja Singh's *wakfnama*. Accordingly, the personnel of the committee was announced and communicated to the members thereof, including the applicant, through the Commissioner of Endowment's letter No. 2259, dated 18th March 1953. The applicant on the other hand, considering himself to be the only person entitled to appoint and fix the panel of the committee, communicated to the Commissioner by his application of 20th March 1953 the panel of the persons to compose the committee of his own selection.

Respondent No. 2 who was appointed to act as the Secretary to the Committee set up by the Department, in pursuance of its resolution passed on 29th March 1953, addressed letter No. 23 dated 30th March 1953 to the Commissioner seeking his aid in divesting the applicant of his connection with and powers over the stocks and registers of the endowment. The applicant in order to forestall an adverse order again approached the Minister-in-charge of the Department on 31st March 1953 urging that inasmuch as he had been declared the lawful *mutawalli* on 12th March 1953, the sole competence and responsibility of appointing the Committee rested with him under the deed of endowment, therefore, the Committee made to function by the department being an interim measure be dissolved and the Committee and its Secretary be interdicted from

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intermeddling with the applicant's management and administration of the endowed properties.

The Hon'ble Minister on 4th April 1953 heard the arguments on behalf of the applicant and being of the opinion that the Government, as custodian and guardian of the endowments, had every right to make alterations in and additions to the personnel of the Committee, as proposed by the applicant and his brother, and make it consist of more public spirited men, repelled the plea for dissolution of the Committee and refused to allow the committee of the applicant's choice to function. In this view of the law, he felt himself fortified by the recalcitrant attitude taken up by the applicant. Further, he ordered the Commissioner of Endowments to reopen the succession inquiry as he had failed to record the evidence in pursuance of the terms of the deed of dedication and also because the other objector and claimant to *tawliat* had in the meanwhile intervened.

The *de novo* inquiry appears to have been ordered in view of the fact that the Rameshwar Pershad had approached the Hon'ble Minister and the Commissioner of Endowments on 24th March 1953 with a petition (though beyond limitation) to have himself declared a fit and proper person for being appointed a *mutawilli* on the allegation that Bala Pershad had misused his influence over Tulja Singh to get himself nominated as a trustee.

The order of the Hon'ble Minister was challenged before the Division Bench on two broad grounds, viz.. (a) that the Regulation and rules under which it purported to have been passed ceased to be in force on the advent of the Constitution of India inasmuch as they contravened the provisions contained in arts. 19, 26 and 254 thereof; and (b) that on the assumption that the Regulation and rules were good law, the impugned order was without or in excess of jurisdiction.

My learned brother M. A. Ansari, J. took the view that the application was well-founded as the relative provisions of the impugned rules were violative of art. 26. As regards art. 19, he considered that it did not apply in view of the observations of Patanjali Sastri, C. J. in the case of *State of West Bengal* v. *Subodh Gopal*, A.I.R. 1954 Supreme Court 92 at 96, that art. 19 (1) (f) applies only to

status and capacity and not to concrete rights in property. On the other hand, my learned brother Srinivasachari, J. held that the order in question was not a final order and therefore the moment was not ripe for considering and deciding as to whether any of the rules under which the order was passed contravened or infringed any fundamental right conferred by the Constitution under art. 19. He further held that the Regulation and rules were existing good laws and were saved by s. 4, Indian Civil Procedure Code and consequently, no question of their being inconsistent with the provision of s. 92, Civil Procedure Code, arose so as to attract the rule laid down in art. 254 of the Constitution. The impugned order in his opinion was well within the the competence of the Hon'ble Minister as it was passed in the exercise of his supervisory and revisional powers under r. 18 of the Regulation. There is, however, no reference in the judgment to art. 26 of the Constitution.

I have had the advantage of the masterly arguments of the learned advocates who appeared on behalf of the parties. During the course of the arguments, the learned advocates for the respondents frankly conceded that if the rules framed under the Regulation and forming the basis of the impugned order go, then they had no case to argue. According to the learned advocate for the applicant, not only the rules but the Regulation itself will have to go because it trenched upon the fundamental rights guaranteed by arts. 19 and 26 of the Constitution. As I have already stated, my brother Ansari has refrained from discussing the effect of art. 19 on the ground that he felt himself bound by the observations of Patanjali Sastri C. J. in the case already referred to above. But the Supreme Court in the later case of the *Commissioner, Hindu Religious Endowments* v. *L. T. Swamiar*, A.I.R. 1954 Supreme Court 282, has not endorsed those observations. At p. 289 of the report Mr. Justice Mukherjee said:

> "In the case of the *State of West Bengal* v. *Subodh Gopal Bose*, an opinion was expressed by Patanjali Sastri, C. J. that art. 19 (1) (f) of the Constitution is concerned only with the abstract right and capacity to acquire, hold and dispose of property and that it has no relation to concrete property rights. This, it may be noted, was an expression of opinion by the learned Chief Justice alone and it was not the decision of the Court; for out of the other four judges who

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together with the Chief Justice constituted the Bench, two did not definitely agree with this view while the remaining two did not definitely express any opinion one way or the other . . . . We would prefer to proceed as this Court had proceeded all along in dealing with similar cases in the past on the footing that art. 19 (1) (f) applies equally to concrete as well as abstract rights of property."

The result of this binding pronouncement under art. 141 of the Constitution is that art. 19 (1) (f) cannot be ignored because it is restricted to abstract rights and capacity of the citizen to acquire, hold and dispose of property.

But before considering, if necessary, the constitutional aspect of the controversy, it would be useful to appreciate the legal position in respect of trust and endowments obtaining in this State before the promulgation of the Regulation and the rules framed thereunder. The law was that every pious minded person should be left unfettered in the creation of trusts and endowments subject to the condition that it was valid according to the law to which he was personally subject. Its management and administration and devolution of *tawliat* were the sole concern of the author of the trust or endowment. His wishes and directions had to be followed and obeyed implicitly. The law only intervened when there was an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature or where the discretion of the court was deemed necessary for the administration of any such trust. In order to protect the trust or endowment from frivolous and vexatious attacks of all and sundry only the *Sarkar-e-Aali* (President of the Executive Council) or two or more persons having an interest in the trust or endowment with the previous consent in writing of the Sarkar-e-Ali were made competent to institute suit for obtaining a decree for all or any of the reliefs mentioned in s. 562, Hyderabad Civil Procedure Code, including the relief for removal of a trustee or appointment of a new trustee. As the remedy provided by s. 562, substantially in *pari materia* with s. 92 of the Indian Civil Procedure Code, was expensive and tardy and dependent upon the discretion of the Court, it was to my knowledge never resorted to by the *Sarkar-e-Aali* and rarely taken advantage of by two or more persons interested in the endowments to set right the maladministration

of the subject-matter of the trust. The then Government of Hyderabad in order to avoid the necessity of having recourse to legal proceedings in matters of Trust conceived the idea of drafting a Regulation and secured sanction of H.E.H. The Nizam to it under s. 57 of the Hyderabad Legislative Council Act (Act III of 1309 F.). In so far as the *mutawalli* was concerned, the Regulation embodied two ss., viz., 12 and 13. Section 12 dealt with the management of endowed properties and provided that the *mutawalli* shall be competent to exercise all the powers conferred upon him by the author of the *wakf* and in case a *mutawalli* is found to be incompetent to function as such, the Minister-in-charge of the Ecclesiastical Department in order to secure a better management of the endowed property and to achieve the objects of the endowment, may frame regulation and rules for his guidance or appoint a superintendent under the said rules. Section 13 laid down that, subject to the terms of endowment, the powers and liabilities of *mutawalli* shall be same as those which legally appertain to a trustee and he shall, subject to the terms of the endowment, manage the endowed properties in the same way as any prudent man would manage his personal property. Significantly enough, no provision, on the analogy of s. 5 of the Indian Religious Endowments Act, was laid down for cases of disputes as to the right of succession to vacated *tawliat*, nor was it provided that the *mutawalli* shall not enter upon the duties of his office unless he was recognized as such by a competent authority. The omission to make any such provisions unmistakably points to the intention of the framers of the Regulation that there should be no vacum between the vacation of the office by the previous *mutawalli* and its assumption by one succeeding him, otherwise they would have provided that during the vacum the endowed property would come under the custody and direct control of the Government of the Ecclesiastical Department. Be that as it may, it is evident from the language employed in s. 12 of the Regulation that the Minister-in-charge of the Ecclesiastical Department is empowered to step in only in cases where the *mutawalli* is found to be incompetent to discharge his duties in relation to endowed properties and not otherwise. This fact fortifies me in my opinion that the framers of the Regulation did not intend to effect any change in the state of law as it existed before the promulgation of the Regulation, except that they desired to eliminate the agency of the civil court

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for making schemes for better and pr the endowed properties. If that is t no other section has been pointed out to the applicant's case before the H warrant would be found in its pr vi imposition of self-approved Committee against his consent.

The learned advocates for the r to show that the impugned order was wi of the Minister relied upon certain rule of the Regulation. They strenuously Commissioner before granting the appli bound under r. 59 to take evidence fulfilled the test of fitness laid down in had jurisdiction under s. 18 of the Regu Commissioner's order of 20th March 19 question of lack or excess of jurisdictio

This brings me to the consideratio to how far these rules have the fo Herschell observed in the case of *Instit* v. *Lockwood*, 1894 A.C. 347 (359) that :

> "The effect of an enactment i subjects who are affected by it. conform themselves to the provisi The effect of a statutory rule if v precisely the same that every person u to its provisions . . . . But there between a rule and an enactment from such provisions as we are c canvass a rule and determine wh within the power of those who m canvass in that way the provisions ment. Therefore, there is that dif rule and the statute."

The principle enunciated in the o Herschell cited above will be found en Hyderabad General Clauses Act. Th that where by any law a power is confe that power shall be exercised in strict provisions of the parent enactment. *Emperor*, A.I.R. 1934 Rangoon 178, a goon High Court held that rules made power must, on pain of invalidity, be

nor in excess of statutory power authorising them, nor be repugnant to the statute or to the general principles of law.

On these premises, I shall now proceed to examine the rules relied upon by the advocates of the respondents in justification of the impugned order. Section 47 provides that with a view to safeguarding the interests of the endowment, no *mutawalli* shall be competent to assume the duties of *tauliat* merely on the basis of the deed of endowment unless he satisfied the authority mentioned in the rule as to his fitness in respect thereof and during the interim period of inquiry, the competent authority may in his discretion appoint a temporary muntazim. Rule 58, with needless tautology, reiterates the provisions in regard to the indispensability of the test of fitness and provides that the *Nazim, Umur Mazhabi* in making the test will have regard to the character of the claimant and to the facts whether he has passed the examination prescribed by the *Sadaratul Aliaya* and whether he possesses the requisite capacity for managing the affairs of the endowment. Section 59 prescribes that in order to satisfy himself in respect to matters referred in r. 58, the officer making the inquiry shall take necessary evidence and decide the issue accordingly.

I have already shown that s. 12 of the Regulation did not contemplate the fulfilment of any condition precedent on the part of the *mutawalli* to enable him to enter upon the duties of his office. The only condition imposed was that he should discharge his duties in conformity with the wishes, directions and instructions of the author of the endowment. The Minister-in-charge of the Ecclesiastical Department was permitted to intervene only in those cases where the *mutawalli* failed to act according to the wishes of the author of the endowment and mismanaged and even then, he could either frame rules and regulation for the guidance of *mutawalli* or take over the management of the property and have it administered through a muntazim. Rule 47 not only makes a departure from the general law of endowments but makes provisions repugnant to the guiding principle of s. 12 of the Regulation by imposing a condition precedent and substituting the satisfaction as to fitness in place of the choice given to the existing *mutawalli* or *wakif*. I agree with my learned brother Ansari, J. where he says that the necessity of a certificate as to successor's fitness is a clear deprivation of the right of nomination

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which, as I have already stated, was not within the contemplation of the framers of the Regulation at the time when they enacted s. 12 thereof.

The learned advocates for the respondents rely upon s. 16 of the Regulation which empowers the Ecclesiastical Department to frame rules on matters mentioned in the section. My attention is invited to clauses 3 and 10 to show that r. 47 and the subsidiary rules were *intra vires* the rule-making authority. Clause (3) deals with the duties and liabilities of the *mutawalli* and *muntazim*. Clause (10) is a residuary clause permitting the framing of the rules in regard to matters not mentioned in the preceding clauses. But it is to be observed that s. 16 expressly requires that the rules should be consistent with and not repugnant to the Regulation. I cannot put a forced or unnatural construction upon the language of the Regulation in order to bring it in conformity with a rule or vice versa.

It is well settled canon of interpretation that if reconciliation were found to be impossible between the section and the rules made thereunder and the latter is found to be in excess of the statutory power authorising them, the subordinate provision, as the rules framed happen to be must give way and the portions of the rules in excess of statutory power found to be invalid as being *ultra vires* of the rule-making power. However strongly I may feel inclined to the view of my brother Ansari, J. on the constitutional aspect of the question which finds added support from the latest pronouncements of the highest tribunal of the land in the case of *Commissioner, Hindu Religious Endowments* v. *L. T. Swamiar*, A.I.R. 1954 Supreme Court 282, *Rathilal Danachand Gandhi* v. *State of Bombay*, A.I.R. 1954 Supreme Court 388 and *Sri Jagannadth Ramanuj Das* v. *State of Orissa*, A.I.R. 1954 Supreme Court 400, I need not enter into that arena following the rule enunciated by Cooley in his Constitutional Limitations, viz., "In any case where constitutional question is raised, though it may be legitimately presented by the record, yet if the record presents some other clear grounds upon which the court may rest its judgment and thereby render the constitutional question immaterial to the case, that course will be adopted."

Having come to the conclusion stated in the foregoing lines, I may summarily deal with the other heads of arguments addressed to me on behalf of the respondents. It

was argued that the petitioner has another remedy open under s. 10 (b) of the Regulation and r. 83 by way of a regular suit and therefore, the High Court will not interfere in the exercise of its extraordinary constitutional jurisdiction. There is no doubt that the petitioner could have filed a civil suit seeking the same reliefs as they have applied for by means of the present application. I am of the opinion, however, that the Hon'ble Minister has acted without due authority of law and without any jurisdiction or in excess of his legitimate jurisdiction in ordering *de novo* inquiry and in the imposition of the Committe of his own choice. In such a case, this Court is not fettered by the circumstances that an alternative remedy exists in issuing an order under art. 226 of the Constitution. The second argument was that the applicant had taken the chance of the order being in his favour by submitting to the jurisdiction of the Hon'ble Minister and having once submitted to the jurisdiction and failed, he cannot invoke the jurisdiction of the High Court for the issue of a writ. Reliance was placed in this connection on *Lakshman Chettiar* v. *The Commissioner, Corporation of Madras*, A.I.R. 1927 Madras 130, *Surya Rao* v. *The Board of Revenue*, A.I.R. 1953 Madras 172, *Chela Narayan* v. *Joint Registrar of Co-operative Societies, Hyderabad*, I.L.R. 1954 Hyderabad 689, and *Rachamma* v. *The State of Hyderabad*, I.L.R. 1954 Hyderabad 632. In *Rachamma* v. *The State of Hyderabad* I.L.R. 1954 Hyderabad 632, Vithal Rao, J. with whom Misra, C. J. concurred observed, at p. 635:

> "In the case before us, the contention of the petitioner is that there cannot be a review of the decision given by the Revenue Minister on 10-12-1348 F. This contention of the petitioner is devoid of merit because in the revision filed by the petitioner before the Revenue Minister, she did not raise this ground at all. The order of the Revenue Minister indicates that the present petitioner only objected as regards the grounds of review. She argued that the grounds urged were not of the nature on which a review petition could be granted but she did not object to the jurisdiction of the court. On the contrary, she elected to argue the case on its merits and she must, therefore, be taken to have submitted herself to the review jurisdiction in the case. Obviously, she cannot now be allowed to repudiate the order by applying for *certiorari*. We are supported in this view by *Rex* v. *West Suffolk*

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Compensation Authority, (1919) 2 K.B. 374, *Rex* v. *Williams*, (1914) 1 K.B. 608, *Latchmanan Chettiar* v. *Commissioner, Corporation of Madras*, A.I.R. 1927 Madras 130 and *Surya Rao* v. *The Board of Revenue*, A.I.R. 1953 Madras 472."

In the other Hyderabad authority cited on behalf of the respondents, Misra, C.J., with whom Vithal Rao, J. agreed, decided:

> "There is, however, another reason why the petitioner should not be heard to urge the present grounds of want of jurisdiction. It is well known that in the matter of issue of a writ by way of *certiorari*, the High Courts' powers are discretionary, and where the applicant armed with the point which would oust the jurisdiction of the subordinate tribunal has elected to argue the case on its merits before that Court, he must be taken to have submitted to its jurisdiction. He cannot be allowed later to repudiate that decision in a petition for a writ of *certiorari*."

In support of this proposition, reliance was placed upon the authorities cited in Rachamma's case and on *Adiraj Mallikarjuna Rao* v. *Somararam Co-operative Society*, A.I.R. 1938 Madras 69. Having regard to the point towards which I am aiming, I may be excused if I take the liberty of quoting *in extenso* the relevant portions of the decisions upon which the authorities cited of this Court are based. In *Latchmanan Chettiar* v. *Commissioner, Corporation of Madras*, A.I.R. 1927 Madras 130, the learned Judges composing the Full Bench observed :

> "Mr. Krishnaswami Iyengar for the petitioner has frankly conceded that his client did argue the case on the merits both before the Commissioner and before the Chief Judge and that he did not only not confine himself to the contention that those officers had no jurisdiction to entertain an objection to the jurisdiction but that he did not take this point at all. The English authorities which were cited *prima facie* establish the proposition that in such circumstances the applicant cannot obtain a writ of *certiorari ex debito justitiae*, but the court is exercising a discretionary power. See *Queen* v. *Justices of Salop*, (1859) 29 L.J. M.C. 90, *Queen* v. *Justices of Leicester*, (1860) 29 L.J.

M.C. 203, *Queen* v. *Knox*, (1863) 32 L.J. M.C. 257, *Rex* v. *Williams*, (1814) 1 K.B 608 and *Rex* v. *Suffolk Compensation Authority* (1918) 2 K.B. 371. The point taken by Mr. Krishnaswami Iyengar is that failure to object to the jurisdiction of the court whose order is sought to be quashed only debars the applicant when the objection is one involving the investigation of facts which were or should have been within the knowledge of the applicant when he was before the lower court, and does not apply to a contention of law. We see no warrant in the cases for drawing any such distinction because in our opinion the test that they lay down is whether the applicant armed with a point either of law or of fact, which would oust the jurisdiction of the lower court has elected to argue the case on its merits before that court. If so, he has submitted himself to a jurisdiction which he cannot be allowed afterwards to seek to repudiate."

In arriving at this conclusion, the learned Judges acted on this reasoning that in issuing a prerogative writ of *certiorari*, the High Court of Madras acts not under any statute but under the inherent powers which devolved upon the High Court from the old Supreme Court and the High Court, therefore, stands with regard to such a writ in the same position as the Court of King's Bench in England and ought to follow the rules laid down by that Court in the decided English cases as to the scope and limitation of its jurisdiction.

It is not disputed before me that remedy by way of prerogative writs is now statutory albeit a constitutional remedy and the supreme legislature of the land has not imposed on the plain terms of art. 226, any limitation. In *Emperor* v. *Bankatram Lachiram*, I.L.R. 28 Bombay 533, the High Court of Bombay had to deal with a suggestion that the courts have imposed on the plain terms of s. 439, Cr.P.C., a gloss which narrows the scope of the discretion vested in the High Courts. In repelling the contention, Sir L.H. Jenkins observed, and his observations at p. 566 are worth quoting *in extenso*:

"If we have been entrusted with the responsibility of a wide discretion we should be the last to attempt to fetter that discretion and whenever it is argued that judicial decision has deprived us of the power that the

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legislature has given us, I recall the words of an eminent English Judge, "I desire to repeat" he said "what I have said before. that this controlling power of the court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. For myself, I say emphatically that this discretion ought not to be crystallized as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untramelled and free so as to be fairly exercised according to the exigencies of each case."

These weighty words appear to me to breathe spirit that should guide us in the exercise of our discretionary powers of revision. This may perhaps increase our responsibilities and add to our labours, but no one would shirk the one or grudge the other."

In this respect, I may also refer to the opinion which I have expressed in *Raja Pratapgirjee* v. *Sarkar-e-Aali*, 35 Deccan Law Report 153 at p. 198. That opinion is strengthened by the latest pronouncement of the Supreme Court in the case of *T. C. Basappa* v. *T. Nagappa*, A.I.R. 1954 Supreme Court 440, wherein Justice B. K. Mukherjee, while delivering the judgment of the Court, observed at p. 443 of the report:

> "In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

In the English cases available to me, I find that the learned Judges, who decided the *Queen* v. *Salop*, EL & EL

v. *Knox*, 8 L.T. 330 were dealing with a
h was covered by the provisions of Stat. 53
7, which after empowering church-wardens
ore justices persons refusing to pay a church
that "if the validity of such rate, or the
person from whom it is demanded to pay
disputed and the party disputing the same
ereof to the justices, the justices shall for-
lgment thereon." The facts in the former
at the hearing of the summons before the
torney who appeared for the person sum-
objection to the jurisdiction of the justices
aw bound to do, but, after cross-examining
alled by the church-wardens submitted objec-
validity of the rate to the decision of the
justices having overruled the objections he
nd not before, gave them notice that he
ted the validity of the rate. The justices,
e an order upon the person summoned to pay
these facts, it was held that in order to
diction of justices under the section cited,
ne validity of the rate is disputed must be
n in a manner such as to induce them to
judgment. Crompton, J. observed that the
cts is that parties came before the justices,
o decide the matter and did not in any way
urisdiction. The justices having given their
as too much to ask the court to issue the
writ of *certiorari*. He further observed that
ention of the statute that the person disputing
the rate should at once give notice to that
justices, not that he should first lead the
ide the question and then dispute their juris-
de it. In *Reg* v. *Knox*, Wightman, J. on facts
fours observed that there were many objec-
the rates but they were left to the justices
when they decided, he says he will appeal—
Reg v. *Salop;* but the court said that they
it the *certiorari* after the justices had been
go into the case. It would thus appear that
ases, there was a statutory duty on the part
ier to have raised the objection as to juris-
the cause was gone into on its merits. No
on who fails to demur in terms of the statute
nitted to challenge that jurisdiction by way

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of *certiorari*. In *Rex* v. *Williams*, (1914) 1 K.B. 608, a baker was charged under s. 4 of the Bread Act, 1836 with selling bread otherwise than by weight and was convicted in the presence of two justices. He obtained a *rule nisi* for a writ of *certiorari* to quash the conviction on the ground that one of the justices alleged to have taken part in the conviction was a person concerned in the business of a baker. The affidavit on which the *rule nisi* was obtained did not state that any objection to the competence of the court was taken at the hearing before the justices, nor did it state that at the date of that hearing the applicant was without knowledge of the facts alleged to disqualify one of the justices. It was held that the applicant was not entitled to the writ *ex debito justitiae* because knowing of the disqualification he had chosen to stand by during the hearing before the justices without taking any objection. This case was distinguished in *Rex* v. *West Suffolk Compensation Authority*, (1919) 2 K.B. 364, and it was held therein that a person who is aggrieved by an order is entitled to *ex debito justitiae* to a writ *certiorari* to set it aside unless there has been some conduct on his part which disentitled him to the writ. The underlying principle of these authorities seems to me to be that had the objection been taken in the proper forum, the defect of jurisdiction would have been cured in such a way as to avoid the necessity of a trial *de novo*.

For purposes of this case, with which I am concerned, the authorities cited on behalf of the respondents are clearly distinguishable. No conduct on the part of the applicant had been pointed out to me disentitling him to relief except that he drew the attention of the Minister that he had no power and jurisdiction to appoint a committee of his own choice. This fact takes the present case out of the purview of the *ratio decidendi* of the authorities relied upon in support of the contention. So far as I can see, the applicant's case is directly within the rule laid down in *Rex* v. *Richmond, Confirming Authority*, (1921) 1 K.B. 248 wherein one of the points taken was that notwithstanding the excess of jurisdiction, the court ought not to interfere by making the rule absolute for *certiorari* because the applicant does not apply *ex debito justitiae* but can only ask the court to exercise its discretion as to granting the writ. Earl Reading repelled the contention and observed:

> "The first point turns entirely upon the question whether the applicant can be said to be a person aggrieved . . . . The applicant does not in my opinion stand in the same category as a member of the public who may be said to have only a general interest in seeing that the law is properly carried out. He had a particular interest in the subject matter, and nothing can better show this than the fact that he incurred the expense of instructing counsel to secure, if he could, the refusal of the confirmation and to contend that the Confirming Authority had no jurisdiction. Bearing in mind, that applicant is a person who was entitled to appear and object as having this interest that he was carrying on as the licensee of premises in Richmond, I think, the case comes within the decision of *Rex* v. *Groom*.

Then, after discussing the several authorities, learned C. J. at p. 255 summed up by saying:

> "In the present case the applicant has suffered by the usurpation of jurisdiction by the Confirmation Authority, inasmuch as his objection was overruled by that authority in the sense that they said they had jurisdiction when he said that he had not. He was entitled to raise the point, and consequently, he suffered from the usurpation when they decided against him . . . . Of course, it may be that a person's interest is so slight that the court will not act upon it but where, as here, it is substantial, the court is bound to issue the writ where it appears on the face of the order that there has been a wrongful exercise of jurisdiction in the sense of an excess of jurisdiction."

This authority was also followed by my learned brother Srinivasachariin *Mannalal* v. *Nazim, Ecclesiastical Department*, A.I.R. 1950 Hyderabad 1, in repelling the contention raised before me. The point taken by the learned advocate for the respondents, therefore, fails.

Lastly, it was argued that the impugned order being provisional or interim in character, should not be disturbed until the final outcome of the whole proceeding. As I have already shown, the order proceeds on the footing of the alleged right of the Government to make additions and alterations to the Committee formed by the *mutawalli*, that

the *mutawallishiip* of the applicant had been sanctioned without the requisite inquiry and fresh objectors have intervened and lastly, because of the truculent attitude of the applicant. The first ground, I have already dealt with. The second ground lacked substance in view of the fact that evidence was recorded by the Commissioner of Endowments and the witnesses had testified to the applicant being the person appointed by Bala Pershad and a fit one to discharge the duties in terms of the deed of endowment, which indeed had not been challenged or denied even by his brother, who alone contested his right. The third ground is also wanting in jurisdiction since the fresh objector had not intervened within the prescribed period of two months. Lastly, insistence upon one's rights cannot in law be regarded to be truculence so as to justify a fresh inquiry in a case in which neither before the Hon'ble Minister nor before us there was or is an allegation that the applicant was an impostor.

For the reasons stated above, agreeing with my learned brother Mohammad Ahmed Ansari, J. I allow the writ application, quash the order of 4th April 1952 and direct the Government to allow the applicant to function in terms of the trust deed of Tulja Pershad.

Petition allowed.

APPELLATE CIVIL

Before Mr. Justice Syed Qamar Hasan and
Mr. Justice Vithal Rao Deshpande

GOPIKISHEN, deceased by L.R. RAMDAYAL* APPELLANT*

v.

SRI KISHEN .. .. .. RESPONDENT

Transfer of Property Act, ss. 76 (h) and 77—Liability of mortgagee in possession of mortgaged property to account for the income—Stipulation that income to be in lieu of interest—No liability to account and no claim for interest.

The deceased appellant borrowed a sum of Rs. 3,000 from the respondent under a mortgage deed, the terms of which were that the

* Civil Appeal No. 162 of 1357 F. 29th October 1954

payable within 3 years and would carry interest at the cent per mensem which would be appropriated by the the income of the hypotheca arising by way of rent. y the respondent for the recovery of principal and stion that arose for consideration was whether in view n the suit bond, the respondent was entitled to any

under cl (h) of s 76 of the Transfer of Property Act, n possession of the mortgaged property is bound to income he derives unless he establishes that the contract e provisions of s. 77 Section 77 applies to cases where ct between the mortgagee and the mortgagor that the e mortgaged property shall so long as the mortgagee is the property be taken in lieu of such interest on the or in lieu of such interest and defined portions of the e usufruct exceeds the interest or the interest and the rincipal as the case may be towards which the usufruct ated, the mortgagee would be benefited thereby. If he is he who must bear it.

nt case, having regard to the covenant in the mortgage ortgagee is to take the usufruct in lieu of interest, the entitled to any interest.

. Mohammed Mah, A I R. 1933 P.C. 136
lli Khan v. *Ali Mirza Khan*, A.I.R. 1931 Oudh. 220
a v. *Narasimham*, A.I R. 1911 Mad. 501

relied on

n the judgment and decree of the Court of the District bad, dated 24th Amardad 1353 F. in appeal No. 654 of ile of that court.

Deshpande
Pershad
n Somani
} *Advocates* for Appellant.

Abdullah, *Advocate* for Respondent.

JUDGMENT

n appeal on behalf of the defendant, Gopi deceased and now represented by Ramdayal gment and decree of the Nazim, Sadar Adalat, dated 24th Amardad 1353 F. by which he judgment of the Additional Judge, Jalna, liminary decree for O.S. Rs. 7,142-8-0 in a suit he respondent for foreclosure.

s lie in a very small compass and the point is . The deceased appellant, on 6th Amardad,

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—

1337 F., borrowed a sum of Rs. 3,000 B.G., and to secure the payment of the said amount mortgaged with possession a godown bearing Nos. 2495 and 2496 situate in Jalna. The terms under which the mortgage was created were that the loan would be repayable within three years and would carry interest at the rate of Re. 1 per cent per mensem, which would be appropriated by the mortgagee from the income of the hypotheca arising by way of rent, *Raqam ko sud fi meh fi sadi ek rupea tai howa aur kothe se jo kraya usul hoga wo raqam-e-sud menjama hoga.*

The defendant in his written statement admitted the mortgage and the terms thereof but demurred to the adequacy of the rent which the mortgagee asserted th have realised from the leases of the hypotheca.

The trial judge, with whom the lower appellate court concurred, held that as the amount which the mortgagee was able to realise fell short of the interest according to the rate stipulated in the mortgage bond, the mortgagor was bound to make good the deficiency. He, therefore, passed a preliminary decree ordering the appellant to pay the principal amount and the interest amounting to Rs. 3,147, within six months from the date of the decree. He further directed that on the deposit of the said amount within the period specified, the mortgagor would be entitled to deduct the amount of rent which the mortgagee might realise from the date of the institution of the suit to the date on which the decretal amount may be deposited.

On second appeal, a learned Bench of this Court by its order of 2nd Dai 1358 F., sent the case to the trial court for recording the evidence and its opinion as to the correctness of the amount of rents alleged by the mortgagee to have been received by him upto the date of the institution of the suit. No evidence was produced by the contestants and the trial judge sent back the case with his opinion that the amount of rent alleged in para 3 of the plaint seemed to be a correct statement of fact.

When the appeal again came on for hearing before another Bench, reliance was placed on O. 34, r. 2, Civil Procedure Code, for the contention that the courts below have erred in taking the date of the institution of the suit as *terminus ad quem* for the accounting of the realisations. The Bench found force in the contention and decided:—

opinion, this contention is correct. Advo-
ne respondent admits that he cannot under
f damdupat realise interest more than the
Therefore, in all he can get L.C. Rs. 6,000
ch he realised as rent Rs. 2,251 till the filing
. Now, he is entitled to get only Rs. 3,749.
vhich he has realised or could have realised
nortgaged property in his possession from the
e suit to the date of the decree must be
from this sum. Plaintiff has not proved how
nas realised. Therefore, in order that this
oved, the case must be sent back to the
rt and after receiving the evidence, the
l be finally disposed of."

with the above order, the lower court has
vidence and forwarded its opinion. On the
pinion, the learned advocate for the appel-
that further sums should be deducted from
the Bench has held the respondent entitled
a the appellant.

y unfortunate that Order 34, rule 2, was
olding the contention of the appellant and
as made to ss. 76 and 77 of the Hyderabad
operty Act, which applied to the present
76 enumerated the liabilities of the mort-
ssion; cl. (ح) of that section provided that

eipt from the mortgaged property, or where
erty is personally occupied by him, a fair
a rent in respect thereof shall, after deduct-
xpenses mentioned in cls. (ج) and (د) and

ereon, be debited against him in reduction
ount (if any) due to him on account of in-
, so far as such receipt exceeds any interest
duction or discharge of the mortgage money;
is, if any, shall be paid to the mortgagor."

s not been made subject to a contract to the
me other clauses of the section has been
esult is that a mortgagee cannot contract
the duty to account. Every mortgagee in
ound to account unless he establishes that
is covered by the provisions of s. 77. The

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latter section provided that nothing in s. 76, cls. (ب), (د), (ز) and (ح), corresponding to cls. (b), (d), (g) and (h) of s. 76 of the Indian Transfer of Property Act, applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal. In the cases referred to in this section, the mortgagor is not concerned as to whether the mortgagee fulfils his liabilities under cls. (b), (g) and (h) of s. 76. If the usufruct exceeds the interest or the interest and the portion of the principal as the case may be, towards which the usufruct is to be appropriated, the mortgagee would be benefited thereby. If he incurs a loss, it is he who must bear it. There is no dispute that in the present case, there is a contract between the mortgagor and the mortgagee that the mortgagee is to take the usufruct for the whole interest. In *Bachu Lal* v. *Mohammad Mah*, A.I.R. 1933 Privy Council 136 (146), their Lordships were dealing with a mortgage in which one of the stipulations was that the mortgagee shall appropriate the surplus profits towards interest and the mortgagor was to have no claim for profits. Their Lordships held that the mortgage was a contract within the meaning of s. 77 of the Transfer of Property Act and that the mortgagee was not bound to account for rents and profits of the mortgaged premises.

It was contended on behalf of the respondent that as the parties had agreed upon a specified rate of interest, it must be deduced that they intended to covenant that in case receipts fell short of the accrued interest according to the terms of the mortgage bond, the mortgagor would make up the deficiency. In support of the contention, reliance is placed upon a recital in the suit document, the mortgage bond. whereby the mortgagor would make up the deficinecy. In our view, this contention is devoid of substance. In *Mahmood Ali Khan* v. *Ali Mirza Khan*, A.I.R. 1934 Oudh 220 (221), the deed of sub-mortgage recited that the sub-mortgagor was borrowing a sum of money and would pay the amount with interest. It was also recited that the sub-mortgagee was put in possession and that after payment of Government revenue out of the profits he would appropriate the balance in payment of interest. It was held that simply because the rate of interest was

mentioned, it would not follow that the parties must have intended that there was to be accounting between them. In the case of *Rameshwar Prasad* v. *Ram Asrey*, A.I.R. 1942 Oudh 499 (500), a simple mortgage provided that the mortgagee would be entitled to take possession of the mortgaged property on the mortgagor's default in the payment of principal and interest at the stipulated time. It further provided that at any time after taking of such possession, the mortgagor would be entitled to redeem on payment of interest accumulated and due upto the time of taking possession in a lump. It was held that the provision in the deed that the mortgagor had to pay a definite sum towards the principal and accumulated interest in a lump sum at the time of redemption excluded any intention on the part of the mortgagor that there shall be accounting between the parties for the period subsequent to the date of taking possession and therefore, the case was governed by s. 77 of the Transfer of Property Act. The Madras High Court has held in the case of *Jagannadham* v. *Narsimham*, A.I.R. 1944 Madras 501 (502), that the mention of interest at a particular rate could only be regarded as made for the purpose of assessing the return to the mortgagee on the amount invested by him on the estimated yield and did not render the mortgagee liable to account.

On the language of s. 77 and the authorities cited above, we are of the opinion that having regard to the covenant for interest and to the fact that the respondent had all along been in possession of the hypotheca, he is not entitled to any interest at all. The result is that the appeal succeeds and is hereby allowed with costs. The decree of the trial Judge will, therefore, stand modified to the extent of the interest allowed therein and also in regard to the deductions directed to be made on the date of the deposit in court of the decretal amount. The appellant do now pay Rs. 3,000 I.G. within one month from the date of the decree subject to any extensions, if any, which may be made by the trial Judge; otherwise a decree for foreclosure will follow.

Appeal allowed.

Haji Mohd Khaja
v.
Akbar Ali

APPELLATE CIVIL

Before Mr. Justice Mohammed Ahmed Ansari and Mr. Justice Syed Taqi Bilgrami

HAJI MOHAMMED KHAJA .. .. APPELLANT*

v.

AKBAR ALI AND ANOTHER .. .. RESPONDENTS

Auctioneer's, liability of—Auction sale rescinded for misrepresentation—Purchaser's suit for recovery of money paid and interest by way of damages—Section 238, Contract Act—Whether exonerates liability.

The respondents purchased certain plots of land at a public auction conducted by the appellant-auctioneer. But the sale was rescinded on the ground of misrepresentation. The respondents filed a suit for the refund of the portion of the purchase money paid and also for interest by way of damages. It was contended on behalf of the auctioneer-appellant that under s. 238 of the Contract Act, an agent was not personally liable for the misrepresentation of the principal, viz., the owner of the land and that interest by way of damages cannot be awarded under s. 73 of the Contract Act.

Held, that the sole object of s. 238. Contract Act, was to provide for those circumstances under which it was intended that a principal should be liable for the acts of his agent and nothing more. The court cannot, while applying a particular statutory provision, stretch it to embrace cases which it was never intended to govern. It cannot ignore the obvious object and the intention of the legislature, apparent from the context, and so interpret and construe it as to enlarge the scope of its applicability by importing into it, meaning by implications which do not necessarily arise. The above section does not apply to the circumstances in which the personal liability of an agent may or may not arise and which was apparently not the object, directly or indirectly of the legislature when enacting the particular provision. To gather, therefore, from the silence of this section regarding the liability of an agent, an intention of the legislature that such an agent will not be liable personally, even though he be guilty of fraud, will not only be contrary to all canons of interpretation but most unjustifiable and absurd. In the absence of any express provisions in the Contract Act, general principles of equity will be applied under which an agent guilty of fraud, duress or any wrong cannot be permitted to escape personal liability on the ground that it was his principal and not he who was benefited by such fraud or wrong.

Further, even in the absence of fraud on his part, the auctioneer is personally liable to the vendee for the deposit received from him, even though he paid it over to the vendor because his position is that of stake-holder who is not expected to pay the deposit over to the vendor before the sale is completed and he becomes an agent after the auction of both the vendor and the vendee. If the sale is rescinded

* Civil Appeal No. 951 of 1358 F. 2nd November 1954

before the completion, he must pay back the deposit to the vendee. If before the completion of sale he pays it over to the vendor, he does so at his peril.

Oates v. *Hudson, 86 R.R. 326*
Sharland v. *Mildon, 71 R.R. 180*
Smith v. *Sleap, (1844) 12 M. and W. 585*
Stell v. *William, 91 R.R. 673*
Clippens Oil Co. Ltd. v. *Edingburgh and District Water Trustees, (1907) A.C. 301*
Gray v. *Gurtridge, 31 R.R. 343*
Burrough v. *Skimer, (1770) 5 Burr. 2639*
Furtado v. *Lumley, (1890) 6 T.L.R. 168*

relied on.

Contract Act, s. 73—Awarding of interest by way of damages—Principle.

Though no interest by way of damages can be awarded under s. 73 of the Contract Act where a debt is wrongfully detained but where the money is obtained or retained by fraud, equitable jurisdiction is attracted and interest by way of damages can be awarded.

Dybijai Nath v. *Tirbent Nath Tewari, (1945) 222 I.C. 399*
Naunti Das v. *Macharsa, A.I.R. (1934) Nag. 79*
Trojan & Co. v. *Nagappa Chettiar, A.I.R. (1953) S.C. 235*

relied on.

Judicial Precedents—Application of.

A judicial decision is only an authority for the point it actually decides and general propositions propounded in the judgment should be looked into in the light of the particular circumstances of that case and they should not be applied by implication to questions which had not arisen in that case.

Appeal from the judgment and decree of the Court of 1st Judge, City Civil Court, dated 29-4-1358 F. in appeal No. 173 of 1357 F. on the file of that court.

Syed Ahmed Ali Khan, Advocate for Appellant.
Jaleel Ahmed, Advocate for Respondents.

JUDGMENT

SYED TAQI BILGRAMI, J.—The facts which give rise to the second appeal by one of the defendants, against the concurrent decrees of the courts below, lie within a narrow compass and are briefly as follows:

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&
S. T. Bilgrami, J.

Six plots of land belonging to respondent No. 2 situate in Dilaurul Mulk grounds, near the tank bund, were sold by the appellant, who is an auctioneer, in a public auction, on March, 25, 1945. Two of these plots were purchased by respondent No.1 for Rs. 13,800, who paid at that time Rs. 3,125, one-fourth of the price. Those facts are not in dispute. The respondent No. 1 then instituted the suit out of which this appeal arises, against the appellant (defendant No. 1) and respondent No. 2 (defendant No. 2) before the Fourth Judge of the City Civil Court, claiming the refund of the Rs. 3,250 and Rs. 685 as interest by way of damages, on the ground that he was induced to purchase the plots on the misrepresentation of the defendants. He has alleged that they made him believe those lands not to be subject to any restriction for constructing building, or for paying revenue, which representations turned out to be false. The defendants filed a joint written statement in which they denied making false representations and also the fact that there was any restriction on building on those plots. They stated that the Cantonment Board of Secunderabad had granted permission for erecting buildings there, and so far as the liability to revenue is concerned, the plaintiff was fully aware at the time of the purchase that those lande were subject to it. The trial court held that the misrepresntations alleged by the plaintiff were proved, and he was entitled to avoid the contract and claim refund of the advance money paid with interest at the rate of 6% per annum from the date of payment, i. e., 21st Ardibehist 1354 F. This decision was affirmed in appeal by the Chief Judge of the City Civil Court and the present second appeal has been preferred by defendant No. 1, the auctioneer against this decree. Defendant No. 2, the owner of the plots, did not appeal; and has been impleaded as respondent No. 2. We were told that he had migrated to Pakistan, and has been declared as evacuee. Since he has not appealed, we did not think it necessary to issue a notice to the Custodian of the Evacuee Property under s. 50 of the Evacuee Property Act.

We are not prepared to disturb the concurrent findings of the courts below on facts, regarding the misrepresentation by the defendants, which induced the plaintiff to purchase the plots. This, in our opinion, is fully proved by the advertisement of the auction, in which it is expressly stated that erection of buildings on the lands is permitted. That this was not true is proved by the statement of

P.W. 1, the Assistant Collector of Bhagat. The question, therefore, that arises for decision in the present appeal is whether the appellant, as an auctioneer and agent of the respondent No. 2, is personally liable.

The learned advocate of the appellant argues, that the appellant not being a party to the fraud is not personally liable. The advertisement, he says, was published in accordance with instructions given to him by the owner of these plots. He had no personal knowledge of the correctness of the statement made therein; nor it was his duty as an auctioneer to ascertain, before publication, the truth of what he was told by the seller. In our opinion, it is not open to the appellant to take up this line of defence in view of his pleadings. He has filed a joint written statement with defendant No. 2, the owner, and expressly asserted therein that there was no restriction on building and that the plaintiff (respondent No. 1) knew at the time of the auction, that the land was subject to payment of revenue. Having failed in proving these facts, he cannot be allowed to say now that he had no personal knowledge of them. This will not be consistent with his statement in his pleadings. He cannot be permitted to approbate and reprobate, to allege certain facts, and in the same breath, deny all knowledge of them. The Calcutta High Court has in *Sultan Mya* v. *Ajiba Khatun Bibi*, A.I.R. (1932) Cal. 497, held that the defendant who had set up in defence a gift followed by delivery of possession, cannot, on failure to prove delivery of possession, be permitted to argue that he was a minor at the time of the gift and the delivery of possession was not necessary. Also in *Siddiq Mohomed Shah* v. *Mt. Saran*, A.I.R. (1910) P. C. 57, it was held that where a claim has never been made in defence, no amount of evidence can be looked into upon a plea which was never put forward. This was followed in *Yehar Fatima Bibi* v. *Mt. Ansar Fatima Bibi*, A.I.R. (1939) All. 348. The point is very clear and no further authorities need be cited. If the appellant had set up this defence, the respondent might have been in a position to prove that he had knowledge of these facts.

Another contention that was advanced on behalf of the appellant is that even if he was a party to the misrepresentation, he is not personally liable because he was merely acting as an agent, and that under the provision of s. 238, Contract Act, even in case of the fraud of an agent,

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it is only the principal who is liable. We do not think that the aforesaid section can be construed to exonerate the agent from his personal liability. The section runs as follows:—

> "Misrepresentations made, or fraud committed, by agents acting in course of their business for the principals, have the same effects on agreements made by such agents as if such misrepresentation or fraud had been made or committed by the principals. But misrepresentations made or frauds committed by agents in matters which do not fall within their authority do not affect their principals.'

It is obvious from the words used and the context, that the sole object which the legislature had in view while framing this section, was to provide for those circumstances under which it was intended that a principal should be liable for the acts of his agent, and nothing more. The court cannot while applying a particular statutory provision stretch it to embrace cases, which it was never intended to govern. It cannot ignore the obvious object and the intention of the legislature, apparent from the context, and so interpret and construe it as to enlarge the scope of its applicability by importing into it, meaning by implications, which do not necessarily arise. The section does not apply to the circumstances in which the personal liability of an agent may or may not arise, and which was apparently not the object, directly or indirectly, of the legislature when enacting the particular provision. To gather, therefore, from the silence of this section regarding the liability of an agent, an intention of the legislature that such an agent will not be liable personally, even though he be guilty of fraud, will not only be contrary to all canons of interpretation, but most unjustifiable and absurd.

In absence of any express provisions in the Contract Act, which is not a complete Code, we have to fall back on the general principles of equity, and seek guidance from the decided cases. We think that an agent, guilty of fraud, duress or any wrong, cannot be permitted to escape personal liability, on the ground that it was his principal and not he who was benefited by such fraud or wrong. We are supported in this opinion by a number of decisions and authorities cited below.

In *Oates* v. *Hudson*, 86 R. R. 326, a will in favour of the plaintiff's wife was in possession of the defendant as an agent and legal adviser of another person. He demanded and obtained some money from the plaintiff on behalf of his principal for handing over this will. In the plaintiff's suit to recover this amount on the ground that it was obtained by duress, it was held, that since the agent was a party and privy to the wrong, he was liable, though he has not benefited personally and had obtained the money for his principal. The same principle holds good when he is a party to fraud and misrepresentation. In *ex parte Edwards re. Champion*, (1884) 13 Q.B.D. 747, a solicitor in a bankruptcy petition received from the debtor, on behalf of the petitioner certain amount of money in consideration of the adjournment, it was held that he was personally liable, notwithstanding the fact that he paid it over to the creditor on whose behalf he had obtained it. Also, in *Sharland* v. *Mildon*, 71 R. R. 180, it was held that an agent of an *executor de son tort* is liable for the assets, collected by him, even though he has paid to his principal, for payment over is no defence in the case of a wrong doer. In *Smith* v. *Sleap*, (1844) 12 M. and W. 585, it was held similarly, that where the amount sued for was received by the agent on behalf of the principal by a wrongful act to which he was a party, he is personally liable though he has paid over this amount to the principal. See also in this regard *Wakefield* v. *Newbon*, 66 R. R. 379, *Townson* v. *Wilson*, (1808) 1, Camp 396, *Steel* v. *William*, 91 R.R. 673 and *Clippens Oil Company, Limited* v. *Edinburgh and District Water Trustees*, (1907) A. C. 301.

It is true that an agent, if the money paid to him is paid under a mistake, and he has paid it over to the principal, he is not personally liable, but this is no defence when he is a party to the wrong or fraud, by which the other party was induced to make the payment — Pollock & Mulla on Indian Contract Act, 7th Edition, p. 632 and Bowstead on Agency, 6th Edition, art. 125 (b), pp. 421-422.

Apart from this general rule, an auctioneer's position is that of a stake-holder and an agent both of seller and purchaser, and consequently, he is to a greater extent personally liable for the deposit he receives. In *Gray* v. *Gartridge*, 31 R.R. 343, it was held that an auctioneer is both the agent of the vendor, and vendee, and if owing

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to the defect of the title of vendor, the sale could not be completed, the purchaser can recover the deposit from him, though he had paid it over to the vendor. In *Edwards* v. *Hadding*, 15 R. R. 63, an auctioneer had received the deposit and paid it over to the vendor. The sale could not be completed for want of title. It was held that he was personally liable though he had paid over the money to the vendor, because it was his duty to hold the deposit over till the recession, or completion of the contract. A similar view was taken in *Burrough* v. *Skimer*, (1770) 5 Burr. 2639 and in *Fartado* v. *Lumley*, (1890) 6 T.L.R. 168. The result is that even in absence of fraud on his part, the auctioneer is personally liable to the vendee for the deposit received from him, even though he had paid it over to the vendor, because his position is that of a stake-holder, who is not expected to pay the deposit over to the vendor before the sale is completed, and he becomes an agent after the auction of both the vendor and vendee. If the sale is rescinded before completion, he must pay back the deposit to the vendee. If before completion of sale he pays it over to the vendor, he does so at his peril. It may be different if the contract is repudiated on some ground after the completion of sale, or if the notice of the payment of this amount to vendor is given by the auctioneer, but we are not called upon to consider this question. Firstly, because the defects were discovered before sale deed was registered, and the sale was never completed. Secondly, because apart from his position as an auctioneer, the appellant is liable as an agent who is a party to the fraud, and in such a case whether the sale was completed or not, or whether the notice was given or not, does not make any difference.

The next question that was before us, is whether interest by way of damages should be awarded? Reliance is placed by the learned advocate of the appellant on *Mohomed Nizamuddin* v. *Hanuman Das*, 26 Dec.L.R. 278 and *Bengal Nagpur Railway* v. *Rattanji Ramji*, A.I.R. (1938) P.C. 67. The first case is regarding the recovery of money due on accounts and therefore, not applicable to the present case. Besides this, what has been said there regarding the powers of the courts to award interest, is mere *obiter dicta*, as interest was not awarded in the case. In the second case, their Lordships of the Privy Council have held, that in absence of any express agreement, no interest prior to the institution of the suit can be awarded

for detention of debt under s. 73 of the Contract Act. It was also held, however, that such interest may be awarded, if payable under any other law, or if a state of circumstances were established, which attract equitable jurisdiction. It must be borne in mind, that a decision is only an authority for the point it actually decides, and general propositions propounded in the judgment should be looked into in the light of the particular circumstances of that case, and they should not be applied by implication to questions which had not arisen in that case. In the case, there was no question of the contract being avoided on account of the fraud of the defendant and therefore, it is distinguishable from the present case on that ground. The Allahabad High Court in *Dybijai Nath* v. *Tirbent Nath Tewari*, (1945) 222 I.C. 399, has expressed a view, that this decision is not an authority for the proposition that interest cannot be claimed by way of damages under s. 73 of the Contract Act; all that was held in that case was, that interest cannot be allowed by way of damages for wrongful detention of debt. The Nagpur High Court in *Naunti Das* v. *Macharsa*, A.I.R. (1934) Nag. 79, has held that under s. 73 of the Contract Act, though interest cannot be given because money was withheld, it can be awarded by way of damages. The case, no doubt, was decided earlier than the Privy Council decision relied upon by the appellant's advocate, but what has been laid down therein is still sound law and does not conflict in our view with the Privy Council decision. We find ourselves in entire agreement with the view expressed by their Lordships of the Allahabad High Court and Nagpur High Court in the above two judgments. Moreover, in the Privy Council case relied upon by the appellant, their Lordships have adopted the view expressed in *Maine and New Brunswick Electrical Power Co., Ltd.* v. *Hart*, (1929) A.C. 631, which is as follows:—

> "In order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance."

This means that if circumstances exist, which can attract equitable jurisdiction, interest by way of damages can be awarded. Fraud by the defendant, in our judgment, is a factor, which certainly attracts equitable jurisdiction. The Supreme Court in a recent case of *Messrs. Trojan & Co.*

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v. *Nagappa Chettiar*, A.I.R. (1953) S. C. 235, has decided that where money is obtained or retained by fraud, interest by way of damages can be awarded. This authority decides the controversy and leaves no force in the contention urged on behalf of the appellant. In view of the decisions which we have referred to, the law on the point can be summed up as follows: though no interest by way of damages can be awarded under s. 73 of the Contract Act, where a debt is wrongfully detained, but where the money is obtained or retained by fraud, equitable jurisdiction is attracted and interest by way of damages can be awarded. This is a case where money was obtained by means of false representation and therefore, the order of the courts below awarding interest before the judgment is correct, with the result that this contention of the appellant also fails.

In the result, this appeal is dismissed with costs.

Appeal dismissed.

EXTRAORDINARY ORIGINAL JURISDICTION

Before Mr. Lakshmi Shankar Misra, Chief Justice and Mr. Justice Syed Taqi Bilgrami

MIR ABDULLAH KHAN .. .. .. PETITIONER*

v.

THE GOVERNMENT OF HYDERABAD .. RESPONDENTS

Constitution of India, art. 226—Nature and Scope.

Held, that art. 226, Constitution of India is of a remedial nature; it does not relate to procedure but confers on the High Court powers to interfere in certain cases. The writs under the article can only be issued in cases in which the courts, tribunals or offices, whose act or order is infringed, have acted either without or in excess of jurisdiction or have refused to exercise jurisdiction clearly vested in them; and in cases in which they have acted in flagrant disregard of or contrary to the principles of natural justice. If any irregularity of procedure is relied upon, it must be shown that it affects the jurisdiction or results in manifest and grave injustice. Wide as these powers are, they do not enable the High Court to constitute itself a court of appeal and examine the correctness of the decision or act challenged.

*Writ Application No. 67/5 of 1953

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Parry and Co., Ltd. v. *Commercial Employees Association, A.I.R. 1952 S. C. 179*

Veerappa Pillai v. *Raman and Raman Ltd., A. I. R 1952 S. C. 192*

Ebrahim Abubaker v. *Custodian-General of Evacuee Property, A.I.R 1952 S.C. 319*

relied on.

Constitution of India, Chapter III and art. 311—Rights in the nature of Substantive rights—Application prospective and not retrospective.

Every statute which creates or declares a substantive right or confers on court remedial powers should be taken to be wholly prospective unless by any express provisions or by necessary implication arising from anything provided in the enactment, a retrospective effect is given to it. This rule of interpretation is applicable to the Constitution of India.

In Chapter III of the Constitution are given and defined the rights of every citizen; in art. 311 the rights of particular class namely, the civil servants. The said rights are in the nature of substantive rights and are operative only from the date of the commencement of the Constitution.

Keshavan Madhava Menon v. *The State of Bombay, A.I.R. 1951 S. C. 128*

Pedro v. *The State of Hyderabad, I. L. R. [1952] Hyd. 976*

relied on.

Public Servants (Departmental Enquiry) Regulation No. XI of 1358 F.—Dismissal of public servant under—Whether the Regulation ultra vires the powers of the Military Governor.

The Firman dated 19th September 1948 invested the Military Governor with full administrative and legislative authority. He possessed full authority to pass the impugned Regulation and, therefore, the question of want of or excess of authority does not arise.

Habeeb Mohd. v. *The State of Hyderabad, A.I.R. 1951 S. C. 51*

Sarwarlal v. *The State of Hyderabad, I.L.R. [1954] Hyd. 783.*

relied on.

Jaleel Ahmed, Advocate for Petitioner

B. Narahari Sastri, Govt. Advocate for Respondent

JUDGMENT

SYED TAQI BILGRAMI, J.—This application for the issue of a writ under art. 226 of the Constitution, is directed against the order of the Military Government, dated 7th March 1949, removing the applicant from service without pension. An appeal preferred by him was dismissed and this order was confirmed by the Military Governor on 18th June 1949. A review petition against this decision was filed by the applicant before the Chief Minister which was rejected on 17th November 1953.

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The facts and circumstances, which led to the passing of the impugned orders are briefly as follows:

The applicant, Mir Abdullah Khan, entered the Revenue Service of this State on 30th July 1924, as a 2nd Talukdar. He was promoted and became First Talukdar on 1st Amardad 1339 F. (6th June 1930); eventually he was appointed as Subedar by a Firman of H.E.H. the Nizam, dated 23rd October 1947 and posted at Gulbarga. Soon after the Police Action, the applicant was suspended by an order of the Military Governor, communicated to him through the Revenue Secretary by letter No. 7 dated 4th October 1948, and an enquiry was instituted against him under the Public Servants (Departmental Enquiry) Regulation, No. XI of 1358 F. Col. M. A. Rehman, the then Chairman of the Public Service Commission of the State, was appointed the sole member of the Board of Departmental Enquiry. The applicant was charged with aiding the razakar activities and diverting huge sums of government money for that purpose; with establishing a factory for manufacture of arms and ammunition in his own house to supply razakars with arms; with establishing border and interior centres, as they were called, and with employing Arabs, Rohillas and refugees, who committed loot and rapine on a large scale in the adjacent villages. Besides these, there were other charges against him as shown in para 9 of the counter filed by the Government of like grave nature. Col. M.A. Rehman, to whom a report containing these charges was submitted, conducted an enquiry in presence of the applicant and other officers and the statements made by these officers and explanation of the applicant regarding these charges were recorded. Col. Rehman submitted a report in which he expressed an opinion that the applicant was all-in-all a razakar and appeared to have carried out all instructions received from higher authorities for helping the razakars whole-heartedly, and had a good deal of hand in manufacture of arms and ammunitions. Regarding his character and competence he also referred to some unfavourable remarks made by the then Director-General of the Revenue, Mr. Savidge. He recommended that the applicant may be dismissed, and one-third of the pension to which he would have been normally entitled may be granted in view of his service of 24 years on purely compassionate grounds. The Military Government after receiving this report passed the impugned order dismissing the applicant from service, but the

recommendation regarding pension on compassionate ground was not accepted.

The grounds on which the applicant challenges the order are as follows:

(1) That the Military Governor's Administration Regulation (VII of 1358 F) dated 13th Nov. 1948 was unconstitutional and *ultra vires*, in that the Military Governor had no authority to promulgate it, and therefore, the other Regulations and enactments regarding trials of Government servants cannot be considered repealed by it, and the trial of the applicant conducted under the Regulation and not under the former rules and enactments was irregular and the order of dismissal void. Only the Nizam had the authority to appoint and dismiss a Subedar.

(2) The manner in which the enquiry was conducted was contrary to all principles of natural justice as no evidence was recorded, and no chance of producing defence witnesses was given. It is said in this connection that the order of dismissal was passed on a confidential report, that the applicant was kept ignorant of the grounds on which this order proceeded; that he was given no opportunity to examine the record and that the provisions of the Regulation under which this enquiry was held were not observed.

(3) The Military Governor had no powers to hear the appeal, and his order confirming the Military Government's decision on a protest of the applicant, which he treated as an appeal, was wholly wrong.

The applicant on these grounds prays that the order of dismissal be set aside and the Government ordered to pay to the petitioner the arrears of his salary with increments and pension to which he would have been entitled in the normal course.

The Government contested the application. They maintained that the order having been passed before the commencement of the Constitution cannot be challenged by the issue of a writ under art. 226 of the Constitution and that in any case, the petition should be dismissed due to delay and laches, as it was filed 4½ years after the order was passed. The Military Governor, it is further stated,

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was vested with full authority for administration of the State, and was competent to pass the Regulation under which the enquiry was held, and that the proceedings therein were conducted fairly and in strict accordance with the above Regulation. The Government denied in their entirety the applicant's allegations regarding the unfair nature of the enquiry, and the violation of the principles of natural justice.

It is perfectly clear and it may be stated at the outset that art. 311 of the Indian Constitution cannot be applicable to the present case inasmuch as the enquiry was conducted, and the dismissal order was passed against the applicant before the Constitution came into force. Every statute or all provisions thereof, which creates, or declares a substantive right, or confers on court remedial powers, should be taken to be wholly prospective unless by any experess provisions or by necessary implication arising from anything provided in the enactment, a retrospective effect is given to it. That this rule of interpretation is applicable to the Indian Constitution as well as other statutes is a matter regarding which no doubt can be entertained. The following observation on the point from the judgment of Das, J. in *Keshavan Madhava Menon* v. *The State of Bombay*, A.I.R. 1951 S. C. 128, are apposite.

"Every statute is *prima facie* prospective, unless it is expressly or by necessary implications made to have retrospective operation. There is no reason why this rule of interpretation should not be applied for the purpose of interpreting our Constitution."

Regarding the provisions which deal merely with procedural matters on the other hand, the rule is that retrospective effect should be attributed to them, unless it is expressly, or by necessary implication taken away, or if such interpretation is textually inadmissible, see in this regard A.I.R. 1927 P.C. 242 in *Balvant Ramchander* v *Secretary of State*.

Article 311 confers a substantive right on the members of service of the Union or All India Service or service of the State, i.e., that they cannot be reduced in rank, or removed from the service, except under certain specified circumstances, and only by the authorities mentioned, and on conditions laid down in that article, and as such it can

trospective effect. In Chapter III of the Cons- e given and defined the rights of every citizen, the rights of a particular class. In the case , A.I.R. 1951 S.C. 125, their Lordships of the Court have held that the rights conferred by I of the Constitution being of substantive nature, ons in that Chapter can be operative only from the commencement of the Constitution. The iple will be applicable to art. 311. As held in *he State of Hyderabad*, (I.L.R.) 1952 Hyderabad 11 of the Constitution has no application in the order of reversion against a Government servant ore the commencement of the Constitution.

alil Ahmed, the advocate of the applicant, in se rulings did not press this point, but he argued 26 does not confer any substantive right; its deal with a matter which may be considered and, therefore, a writ application under that lie, even in respect of the order passed prior to into force of the Constitution. He relies on ng rulings in support of this contention: *Prayra y* v. *S. Banerjee*, A.I.R. 1952 Cal. 891, *Harnam-Sharma* v. *State of Madhya Bharat*, A.I.R. 1950 Bharat 46, and *K. S. Rashid & Sons* v. *Income-tigation Commission*, A.I.R. 1954 S. C. 207. The ourt case does not deal with this question at all, t relevant. It seems to us that art. 226 is of a ature; it does not relate to procedure, but confers h Court powers to interfere in certain cases. A w expressed by a Full Bench of Nagpur High Court *am Didu* v. *The State*, A.I.R. 1951 Nag. 443, and / the Division Bench of the same High Court in *nath Pandey* v. *Government of the Union of India*, 3 Nag. 138. The rulings relied upon by the vocate of the applicant do not proceed on the at this article is procedural. The view taken d also in two other cases of Calcutta High Court *las* v. *The State of West Bengal*, A.I.R. 1952 Cal. *Rajendra Kumar* v. *The State of West Bengal*, 2 Cal. 573 is that if an order or an Act is *ultra* nishes a recurring cause of action to the party and he can have recourse to art. 226 of the on, even though such order was passed before the ment of the Constitution. It is, however, un- to discuss the point in detail, because, firstly, the

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power to issue a writ *certiorari* was exercised by this Court even before the Constitution came into force as in *Raja Pratapgir* v. *Sarkar Ali's* case (35 Dec. L.R. 153), and secondly, because we think that no case has been made out by the applicant even if the wider powers conferred under art. 226 of the Constitution are exercised.

The writs under the above article can only be issued in very grave cases, cases in which the courts, tribunals or offices whose act or order is impugned have acted either without, or in excess of jurisdiction, or have refused to exercise jurisdiction clearly vested in them; and in cases in which they have acted in flagrant disregard of, or contrary to the principles of natural justice. If any irregularity in procedure is relied upon, it must be shown that it affects the jurisdiction or results in manifest and grave injustice Wide as these powers are, they do not enable the court to constitute itself a court of appeal, and examine the correctness of the decision or act challenged. That the powers conferred by art. 226 can only be invoked under the circumstances set out above and exercised within those limits, has been emphasised by the Supreme Court in *Parry & Co., Ltd.* v. *Commercial Employees Association, Madras*, A.I.R. 1952 S.C. 179, and again in *Veerappa Pillai* v. *Raman & Raman Ltd.*, A.I.R. 1952 S.C. and *Ebrahim Abubakar* v. *Custodian-General Evacuee Property*, A.I.R. 1952 S.C. 319, and in many decisions by this Court which it is unnecessary to cite.

We shall now proceed to examine the applicant's arguments in this light, and see if there is any legitimate cause to justify the questioning of the impugned order.

The first ground on which the order is assailed is that General Choudhury, the Military Governor, had no powers or authority to pass the Regulation under which the enquiry was made, because the Firman dated 19th September 1948 does not expressly confer such an authority and the assent of the Nizam was not obtained. In our opinion, the Firman dated 19th September 1948, invested General Chaudhury with full administrative authority in Hyderabad. It said:

> "Whereas the General Officer Commanding-in-Chief Southern Army, has appointed Major-General J. N. Choudhury, O.B.E., to be the Military Governor

for the Hyderabad State and *whereas* all authority for the administration of the State now vests in him, I hereby enjoin all the subjects of the State to carry out such orders as he may deem fit to issue from time to time. I appeal to all officers of the State administration and subjects of the State to render faithful and unflinching obedience to the Military Governor and conduct themselves in a manner calculated to bring about the speedy restoration of law and order in the State."

That he possessed full authority to pass such Regulations, as are in question here, has been recognised by their Lordships of the Supreme Court in the case of *Habeeb Mohd.* v. *The State of Hyderabad*, A.I.R. 1954 S.C. 51, as will appear from the following extract from the concluding portion of the judgment of Mahajan, Chief Justice, who delivered the judgment of the Court at p. 61:

> "Further, it was argued that the Special Judge had no jurisdiction because H.E.H. the Nizam had not given his assent to the law as contained in Ordinance X of 1359 F. In our opinion, there is no substance in this contention, because the Nizam under a Firman had delegated all his powers of administration including power of legislation to the Military Governor and that being so, no further reference to the Nizam was necessary, and the Military Governor was entitled to issue the Ordinance in question."

A Division Bench of this High Court recently in *Sarwarlal* v. *The State of Hyderabad*, I.L.R. 1954 Hyderabad 783, referring to this very Firman (see p. 789) held that in exercise of the authority conferred by it, the Military Governor was vested with the powers to pass the Abolition of Jagir Regulation of 15th August 1949. No other reason appears, or was shown, for considering the Military Governor's Administration Regulation of 1948 invalid and we think that art. 13 of the Constitution cannot be given retrospective operation on the principle enunciated in *Keshavan Madhava Menon's* case referred to in an earlier part of this judgment. We overrule this contention.

The next question we have to decide is whether the enquiry was held fairly and in accordance with the Regulations or whether the Board in making the enquiries, or the

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S. T. Bilgrami, J.

Government and the Military Governor in passing the order, acted in excess of jurisdiction or contrary to the principles of natural justice. It was pointed out that the depositions of witnesses were not recorded, and proceedings do not indicate that any regular trial was held in the presence of the applicant. The Regulation, however, does not prescribe that full statement of witnesses should be separately recorded; on the other hand, in r. 5 (2) it is expressly laid down that the Board shall not be bound to summon or examine witnesses The contention of the applicant's counsel, therefore, that omission to do this vitiated the enquiry is not tenable. By looking at the record of enquiry conducted by Col. Rehman, who was appointed the sole member of the Board, it appears that he made enquiries from the other officers in the presence of the applicant, asked the applicant's explanation, and recorded the answers. The mode of conducting the enquiry prescribed by r. 5, was as follows:—

> "5. (1) The Board shall examine the evidence against the public servant whose case is referred to it, shall record his statement, if any, and shall examine the evidence, if any, produced by him in his defence.
>
> (1-A) The Board shall hold the enquiry in the absence of the public servant if he does not appear before it in spite of a notice having been issued to him.
>
> (2) The Board shall not be bound to summon or examine any witness, if in its opinion the production or examination of any such witness is sought to cause delay or vexation.
>
> (3) Save with permission of the Board, no pleader or advocate shall be allowed to appear in an enquiry held under this Regulation.
>
> (4) It shall not be necessary for the Board to record at length the evidence of a witness or to frame a charge.
>
> (5) The past record and general reputation of a public servant shall be relevant evidence in the inquiry against him.
>
> (6) The Board shall after completing the enquiry submit a report with its recommendation to the Military Government.

Col. Rehman did examine the officers in the presence of the applicant. It was not necessary to record verbatim the full depositions of the witnesses and we are satisfied that ample opportunity was afforded to the applicant to explain and defend himself against the charges brought. It is not true that the enquiry was held and report made confidentially, in the sense that the applicant was not given an opportunity to know on what grounds his conduct was questioned, or that he was deprived of an opportunity to defend his case, as alleged in the application. From our perusal of the record of enquiry, we find that the applicant did not express any wish to produce defence witnessess. In our opinion, in conducting this enquiry the Regulations were not infringed and the Board did not exceed the jurisdiction, or act contrary to the principles of natural justice.

Whether the evidence was sufficient to justify an order of dismissal or not is not a question which we can consider in a writ application. According to r. 6 of the Regulation, as it stood after its amendment by Regulation No. XXXII of 1358 F., the Military Government on receipt of the report could pass the order of dismissal and the Military Governor possessed full authority to hear and dismiss the appeal preferred by the applicant under the r. 6 (A) as amended by the above mentioned Regulation.

In our judgment neither the Government nor the Military Governor exceeded their respective jurisdiction. Shri Jalil Ahmed for the applicant says that in view of the amending Regulation of which he was not aware, when he filed the application, does not wish to press the objection that the Military Government had no power to order the dismissal and the Military Governor to hear the appeal.

We have given full and careful consideration to all the grounds urged and points raised on behalf of the applicant and find that none of them can be deemed to be sufficient to justify the issue of a writ against the order impugned.

In the result, the writ application fails and is hereby dismissed with costs of the opposite party which we estimate at Rs. 50.

Petition dismissed.

Abdul Faiz Fakher
v
Abdul Hafeez

APPELLATE CIVIL

Before Mr. Justice Rai Manohar Pershad and
Mr. Justice Vithal Rao Deshpande

ABDUL FAIZ FAKHER AND OTHERS .. APPELLANTS*

v.

ABDUL HAFEEZ AND OTHERS .. RESPONDENTS

Transfer of Property Act, s. 58, cls. (c) (d) and (e)—Sale and agreement to reconvey executed by separate instruments—Transaction, whether can be deemed to be a mortgage—Section 58, cl. (c), Proviso—Nature and scope.

Held, that the proviso to s 58, cl (c), Transfer of Property Act provides that no transaction of sale shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale. The effect of the proviso is that an ostensible sale with a stipulation for repurchase shall not be regarded as a mortgage unless this stipulation is contained in the same document which effects the sale.

The proviso is not restricted in its application to cl. (c) only but applies to transactions under cls. (d) and (e), for it would not make much difference in the legal effect of a sale accompanied by a separate agreement for repurchase to provide that it shall not be deemed to be a mortgage by conditional sale but may be regarded as an English or a usufructuary mortgage. The object of the proviso is evidently to shut out an inquiry whether a sale with a stipulation of retransfer is a mortgage where the stipulation is not embodied in the same document.

Chun Chun Jha v. *Ebadat Ali*, *A I.R. 1955 S. C. 345.*

relied on.

David Elias Duct Cohen v. *Bidyanath Mukherjee*, *A.I.R. 1936 Cal 646.*

J. M. D'souza v *Reserve Bank of India*, *A.I.R. 1946 Bom. 510.*

A. Rajgopal Iyer and others v. *S. Ramchander Iyer*, *A.I.R. 1942 Mad. 628.*

distinguished.

Appeal from the judgment and decree of the Court of the Sub-Judge, Secunderabad, dated 16th June 1954 in case No. 10/1 of 1953-54 on the file of that court.

Vinayak Rao Vaidya, *Advocate* for Appellants.

K. Venkatachar, *Advocate* for Respondents.

* Civil Appeal No 57 1 of 1954-55

22nd February 1955

JUDGMENT

RAI MANOHAR PERSHAD, J.—This is the plaintiffs first appeal which arises out of a suit filed by them for the redemption of the mortgage and dismissed by the Subordinate Judge, Secunderabad. Plaintiffs' case is that Abdul Masud Faqer, the father of the Plaintiffs 1 to 5 and the husband of plaintiff No. 6, was the owner of the suit property; that he had mortgaged the same with the Secunderabad P.C.C. Society and in order to pay the mortgage debt, he approached Mohd. Abdul Rahim, the father of defendants 1 and 2 to advance a loan; that the parties were not willing to have the loan on interest in view of the Islamic law and it was agreed that Rs. 5,500 should be advanced to Abdul Masood Faqer on the mortgage of the suit house and he should execute a document by way of an English Mortgage. It was also agreed that on repayment of the said amount, Abdul Rahim would reconvey the property to Abdul Masood who would continue as owner and Mohd. Abdul Rahim would get interest in the shape of rent from him (Mohd. Abdul Masood). Accordingly, Abdul Masood executed a sale deed in favour of Md. Abdul Rahim on 30th November 1933 for a sum of Rs. 5,500 and on that very date, the father of defendants 1 and 2 also executed an agreement to reconvey the property. Abdul Masood further executed a rental deed on that very date. All the three documents form part of one and the same transaction.

The plaintiffs in the month of February 1953 offered the defendants the mortgage amount and asked them to reconvey the property in their favour. But the defendants however refused to accept the amount alleging that the property was sold to them. The plaintiffs do not admit that the intention of the parties was to treat the transaction as a sale. The plaintiffs, it is stated, have not only been in possession of the property but have been paying the taxes also and, therefore, are entitled to a decree for redemption.

The defendants in their written statements admitted that Abdul Masood Faqer was the owner of the suit property and that he had mortgaged the same to the P.C.C. Society, Secunderabad, but denied that he was intimate with Abdul Rahim, or that he desired or negotiated for a loan from him on security of the said house or that any

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agreement or arrangement was entered into between him and Abdul Masood as alleged by the plaintiffs or that any transaction of loan on the mortgage of the suit house was, in fact, entered into. They further denied that there was any agreement between them; that Mohd. Abdul Masood should continue as owner of the suit house or be in possession as owner or that Abdul Rahim was to get any interest in the shape of rent from Abdul Masood. It is averred that due to pressing demands from the Society for payment of the mortgage amount, Abul Masood desired to sell away the house with a view to repay the mortgage amount of the Society, and offered to sell and convey the house absolutely to Mohd. Abdul Rahim, and accordingly executed the sale deed in his favour. It is also pleaded that even assuming that the plea of the plaintiffs that the said Abdul Rahim agreed to reconvey the house, the agreement gives rise to a separate transaction independent of the sale, and the terms and conditions thereof constitute a separate cause of action. The transaction which is termed by the defendants a mortgage is an out and out sale. A legal objection was also raised that the court had no jurisdiction to try the suit.

On these pleadings the trial court framed the following issues :—

1. Are the plaintiffs entitled in law to prove the allegations,

   (a) that the transaction between Abdul Masood and Md. Abdul Rahim evidenced by the sale deed, rental agreement and agreement to reconvey the same dated 30-11-1933 constitute really an English Mortgage payable within six years ; and

   (b) that the rent provided in the rental agreement was really interest on the mortgage loan ?

2. If the findings on issue No. 1 be in favour of the plaintiffs are the said allegations true ?

3. Has the court jurisdiction to try the suit ?

4. Is the court-fee paid sufficient ?

5. Can the plaintiffs sue without setting aside the documents ?

6. Have the plaintiffs any cause of action? If so, when did it arise and is the suit within time?

7. To what reliefs are the plaintiffs entitled?

The court below after hearing the arguments of the parties relating to issue No. 1 dismissed the suit having come to the conclusion that the transaction in question is an out and out sale.

Aggrieved by this judgment and decree, this appeal is preferred on behalf of the plaintiffs. In this appeal Shri Vinayak Rao Vaidya, the learned advocate for the appellants, urged that the court below has erred in coming to the conclusion that the agreement to reconvey and the sale are not parts of the same transaction He contends that the agreement to reconvey and the sale form part of one and the same transaction. The second contention is that having regard to the fact that Abdul Rahim had agreed to accept a rent to be reduced *pro tanto* and proportionate to any amount to be paid by Abdul Masood Faqer, there can be no inference other than this, that the intention of the parties was to treat the transaction as a mortgage and not a sale. It is further contended that by the subsequent document the previous document has been altered and the court below has not taken this point into consideration. Referring to the definitions of mortgage by conditional sale English mortgage and usufructuary mortgage in s. 58 of the Transfer of Property Act, it is contended that if the document in question is not a mortgage by conditional sale, there is no reason why the same should not be treated as an English mortgage or a usufructuary mortgage. Reliance was placed on the cases of *Mohini Mohan Misra and others* v. *Smt. Sarat Sundari Debi*, A.I.R. 1925 Calcutta 862, *David Elias Duek Cohen* v. *Baidyanath Mukerji and another*, A.I.R. 1936 Calcutta 646, *Fozmal Bhutaji, etc.* v. *Shridhar Vithal*, A.I.R. 1946 Bombay 499 and *A. Rajagopala Iyer* v. *S. Ramchandra Iyer*, A.I.R 1942 Madras 628.

Shri Venkatachar, the learned advocate for the respondent, relying on the case of *Chun Chun Jha* v. *Ebadat Ali*, reported in A.I.R 1954 Supreme Court 345, contended that as the agreement to repurchase and the sale are embodied in separate documents, the transaction can never be treated to be a mortgage whether the documents are contemporaneously executed or not. It is further submitted that the agreement to reconvey and the sale are not parts of the

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same transaction but are independent transactions though they are executed on the same date. With regard to the contention that the document in question should be treated as an English mortgage or a usufructuary mortgage, it is contended that the document in question cannot be treated as an English mortgage as there is no obligation on the part of the mortgagor to repay and it cannot also be a usufructuary mortage, as it is admitted by the plaintiffs that they are in possession. Reliance was placed on the cases reported in *Narayan Iyer* v. *Venkatramana Iyer and others*, I.L.R. 25 Madras 220, *K. Venkat Subba Rao* v. *Bikkina Veeraswami*, A.I.R. 1946 Madras 456, *Samsher Khan Bane Khan* v. *Vithal Das Dwarkadas*, A.I.R. 1946 Nagpur 264, *Jaggannath Singh* v. *Butto Krishto Roy*, A.I.R. 1947 Patna 345 and *R. Suryaprakash Rao, etc.* v. *Gottu Mukkala Venkat Raju and others*, A.I.R. 1953 Madras 830.

Shri Vinayak Rao Vaidya conceded that in the case *Chun Chun Jha* v. *Ebadat Ali*, reported in A.I.R. 1954 Supreme Court 345, their Lordships of the Supreme Court have, no doubt, held that if the agreement to repurchase and the sale are embodied in separate documents, the transactions cannot be treated as a mortgage, but he contends that this decision was based on the proviso to s. 58 (c) of the Transfer of Property Act, whereas there is no such provision in s. 58 (e) or (d) and if that was the intention of the Legislature, a similar provision would have been found in the definition of an "English Mortgage" or a "Usufructuary Mortgage".

To appreciate relevancy of the rulings cited we have to analyse the present transaction. The transaction is embodied in two documents accompanied by a third document (the rental deed),—all dated 30th November 1933 as already stated above. One document purports to be an out and out sale of the property, the other provides that the property shall be reconveyed on repayment of price and the third is the rental agreement. The contention of the appellants is that all the three documents taken together evidence and constitute a mortgage by conditional sale, or an English mortgage or a usufructuary mortgage and attempted to show by the recital in the document itself and by reference to the surrounding circumstances, the real nature of the transaction according to the intention of the parties. The court below refused to go into that question holding that it is an out and out sale. The question in dispute is whether the transaction was a

mortgage by conditional sale or an English mortgage or a usufructuary mortgage as defined in s. 58 (c), (d) and (e) of the Transfer of Property Act; or whether it was, as it appears to be on the very face of it an out and out sale. The point to be considered is whether the question is concluded by the proviso to s. 58 (c) of the Transfer of Property Act which runs thus:

> "Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

The language of the proviso is perfectly clear and unambiguous and its effect is that an ostensible sale with a stipulation for repurchase shall not be regarded as a mortgage unless this stipulation is contained in the same document which effects the sale.

In the case reported in A.I.R. 1954 S. C. 345 (*Chun Chun Jha* v. *Ebadat Ali*), their Lordships of the Supreme Court have held that:

> "If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not."

Shri Vinayak Rao Vaidya conceded that in view of the decision of the Supreme Court, the contention that the transaction in question is a mortgage by conditional sale does not hold good, but he contends that as the new proviso has been introduced into cl. (c) which defines a mortgage by conditional sale, it should not be understood as having a wider scope than the clause itself, and should not be taken to limit or qualify in any way cl. (a) which defines the mortgage. In other words, it is contended that the proviso should be read as providing only that such a transaction shall not be deemed to be a mortgage by conditional sale with the consequence that it can still be regarded as a mortgage falling under s. 58 cl. (d) or (e), if it is established that the intention of the parties was that the transaction should operate as a mortgage and not as an out and out sale with the condition of retransfer.

Shri Venkatachar on behalf of the respondent contends that the recent decision of the Supreme Court is quite clear

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that if the transaction is embodied in separate documents it cannot be treated as a mortgage at all. We cannot accept the construction suggested by the learned advocate for the appellants, for it would involve reading into the proviso the words which are not there, and it would, moreover, stultify the new enactment as it would leave the previous state of law practically unchanged. It is, however, contended that if that was the intention of the Legislature, it could have made similar provision in the other kinds of mortgages also.

We do not agree. For it would not make much difference in the legal effect of a sale accompanied by a separate agreement for repurchase to provide that it shall not be deemed to be a mortgage by conditional sale but may be regarded as an English or a usufructuary mortgage. We do not think that the proviso was intended to have that effect. Its object evidently was to shut out an inquiry whether a sale with a stipulation of retransfer is a mortgage where the stipulation is not embodied in the same document. Further, the document cannot either be accepted to be a usufructuary or an English mortgage, for in the former case the mortgagor binds himself to deliver possession and authorize the mortgagee to retain such possession until repayment of the mortgage money, and to receive the rents and profits accruing from the property in lieu of interest and in the latter case, he binds himself to repay the mortgage money, and none of these conditions exist in the transaction in question.

Three other cases have been cited before us, one of the Calcutta and the other of the Bombay and Madras High Courts, namely, *David Elias Duek Cohen* v. *Bidyanath Mukerjee*, A.I.R. 1936 Cal. 646, *G. M. D'souza* v. *Reserve Bank of India*, A.I.R. 1946 Bombay 510 and *A. Rajgopal Iyer and others* v. *S. Ramchandra Iyer*, A.I.R. 1942 Mad. 628. These are cases where the transaction was not embodied in two separate documents and, therefore, they do not help the contention of the appellants.

Of course, in the last case relied upon by the appellants reported in *Mohini Mohan Misra and others* v. *Srimati Sarat Sundari Debi and another*, A.I.R. 1925 Calcutta 862, the transaction has been embodied in separate documents, but that was a case prior to the amendment of 1929 and cannot help the contention of the appellants.

In the result, we see no force in this appeal. It is, therefore, dismissed. Having regard to the facts of the case, we do not wish to pass any order regarding the costs of this Court.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Mohammed Ahmed Ansari and Mr. Justice P. Jagannmohan Reddy

M/s. VAZIR SULTAN & Co. LTD. .. PETITIONER*

v

COMMISSIONER OF INCOME-TAX, HYDBAD RESPONDENT

Income-tax Act, Indian, ss. 6 (iv) and 12—Assessee, a selling agent in and outside Hyderabad State—Termination of selling agency rights outside the State by payment of compensation Nature of the receipt - Liability to tax

The assessee firm which was acting as a selling agent for Vazir Sultan Tobacco Co., in and outside the Hyderabad State was paid a certain lump sum amount as compensation for termination of its selling agency rights outside the Hyderabad State. The Income-tax authorities took the view that since the assessee had no legal right to claim compensation, it was a voluntary payment made in consideration of past services and therefore, a revenue receipt liable to be taxed under the Income-tax Act. This view was upheld by the Income-tax Appellate Tribunal. The assessee filed the application for reference under s. 66 (1) of the Income-tax Act.

Held, that the Income-tax Act no where defines income. All it does is to enumerate and describe the various heads of income, profits and gains under s. 6 of the Act. If the amount paid to the assessee is deemed to be income, it can only be computed under s. 12 as coming under classification (v) of s. 6, viz, 'income from other sources'. The amount cannot be classified under head (iv), namely, profits and gains of business because the assessee does not trade in agencies. Under the Act, all income is taxable unless it is exempt under the Act The question in each case would be whether a particular amount which is the subject-matter of assessment is income or is a capital receipt or is of an occasional or casual nature.

The cases of compensation paid for termination of contract can ordinarily be divided into two classes, (1) a contract may be made by a trader which is merely directed to result in trading profits being made; (ii) a contract may be made by a trader which is directed to regulate

* Reference No 234 5 of 1953-54 29th November 1954.

Vazir Sultan & Co. Ltd. v Commissioner of Income-Tax, Hyd. — M. A. Ansari, J. & P. J Reddy, J. —

the conditions under which he has to carry on his trade. In the first class of cases, where compensation or damages are received as a result of the termination of a contract or a breach thereof, it might be treated as trading profits. In the second class of cases of compensation received for the termination of business, it cannot be treated as a trading profit as it was paid for the termination of the trade or business and would not be taxable. Neither the fact that the amount of compensation was a voluntary payment nor the fact that the business structure continued even after the termination of a part of the agency would not by itself make any difference in determining the nature of the right surrendered. On the other hand, the question will have to be viewed from the point of view of whether the assessee was permanently excluded from the benefits of a portion of his asset.

Bearing the above considerations in view, the amount of compensation paid to the assessee in this case is to be regarded as surrogatum for the loss of that part of the asset which conferred a valuable right to earn an income outside Hyderabad State and which was sterilized. Therefore, the amount received by the assessee is not income liable to income-tax.

Commissioner of Income-tax v. *Shaw Wallace & Co*, *59 I.A. 206.*

Kamakshi Narayan Singh v. *Commissioner of Income-tax, Bihar and Orissa, 70 I.A. 180.*

Hari Kailash & Co. v. *Commissioner of Income-tax, Uttar Pradesh, C.P. and Berar, 1953 I.T.C. 50.*

Godrej & Co. v. *Commissioner of Income-tax, Bombay City, (1954) 25 I.T.R 108.*

Commissioner of Income-tax and Excess Profits Tax Bombay City v. *Shamser Printing Press, Bombay, (1953) I.T.R. 363.*

Van Den Berghs Ltd. v. *Clark, 1935 A.C. 431.*

Barr Crombie Co. Ltd. v *Commissioner of Inland Revenue, (1945) 26 T.C 406.*

Kelsall Parsons & Co. v. *Commissioner of Inland Revenue, 21 Tax Cases 608.*

discussed.

K Srinivasan, *S. Ranganathan* } *Advocates* for Petitioner

N. Narasimha Iyengar, Advocate for Respondent

ORDER

Income-tax Reference

P. JAGANMOHAN REDDY, J.— On the application of the assessee under s. 66 (1) of the Indian Income-tax Act, The Income-tax Tribunal at Bombay has referred the following question of law, viz: "whether the sum of O. S.

Rs. 2.19,343 received by the assessee firm from Vazir Sultan Tobacco Co., Ltd., is liable to be taxed under the Indian Income-tax Act?"

The circumstances under which the amount of Rs. 2,19,343 was received by the applicant which has now to be examined are set out in the statement of the case from which the following salient facts appear.

The assessee is a registered firm consisting of five brothers and the wife of a deceased brother and these six partners shared the profits and losses equally. The assessee firm was the selling agent for Hyderabad State of Messrs. Vazir Sultan Tobacco Co., Ltd., which manufactures cigarettes. On 6-1-1931, the Board of Directors of Vazir Sultan Tobacco Co., Ltd., passed the following resolution :—

> "Mr. Baker reported that an arrangement had been come to for the time being whereby the firm of Vazir Sultan & Sons were given the distributorship of "Charminar" cigarettes within the H. E. H. the Nizam's Dominions and that they were allowed a discount of 2% on the gross selling price."
>
> "On the proposition of Mr. Baker seconded by Mr. James, the said arrangement was approved."

The Tribunal, in its statement of the case, observed that no formal agreement was drawn up nor is there any correspondence between the assessee firm and the Vazir Sultan Tobacco Co., Ltd. In 1939 it appears that a different arrangement was arrived at between the assessee firm and the Vazir Sultan Tobacco Co., Ltd., whereby the firm was given a discount of 2% not only on the goods sold in the Hyderabad State but also on goods sold outside the Hyderabad State. On 16-6-1950, the following resolution was passed by the Board of Directors of Vazir Sultan Tobacco Co., Ltd. :—

> "The Chairman, having referred to resolution No. 24 passed at the Board meeting held on 6-1-31, and having reported that Vazir Sultan & Sons had agreed to revert to the arrangement outlined in that resolution with effect from 1-6-50, it was on the proposition of Mr. S. N. Bilgrami, seconded by Mr. N. B. Chenoy, resolved that payment of the sum of O. S. Rs. 2,26,263

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be made to Vazir Sultan & Sons by way of compensation; Vazir Sultan & Sons to pay D. B. Akki & Co out of that amount the sum of O. S. Rs. 6,923 also by way of compensation. Mr. Mohd. Sultan and Mr. Hameed Sultan stated that, as partners in the firm of Vazir Sultan & Sons, they did not take part in this resolution, although they had accepted, on behalf of Vazir Sultan & Sons, the terms thereof."

The firm of D. B. Akki & Co., referred in the above resolution, were the sub-agents of the assessee for an area outside Hyderabad which was then British India. In pursuance of the aforesaid resolution, a sum of Rs. 2,26,263 was paid to the assessee firm by the Vazir Sultan Tobacco Co., Ltd., in the year of account relevant for the assessment year 1951-52. The Income-Tax Officer included the sum of Rs. 2,19,343 which was the amount paid to the assessee firm by the Vazir Sultan Tobacco Co., Ltd., after deducting a sum of Rs. 6,920 (O. S.) paid to Messrs. D. B. Akki & Co. The assessee firm claimed an exemption for this amount on the ground that it was a capital receipt being compensation for the loss of distributorship of the selling agencies outside Hyderabad and towards goodwill. The Income-Tax Officer held that the facts in this case differed from that of *Shaw Wallace & Co.*, v. *Commissioner of Income-Tax, Bengal*, 5 I. T. C. 211—in that there was no cessation of agency and the firm continues to be distributors within a restricted sphere and that the payment of Rs. 2,19,343 by the company is not compensation for the loss of agency. He further held that as the assessee had no legal right to claim any compensation for the withdrawal of concession, the amount paid was, in the circumstances, treated as remuneration for past services in the distribution of goods outside Hyderabad State and not as compensation for the loss of agency.

On appeal, the Appellate Assistant Commissioner allowed the claim of the assessee, applying the Shaw Wallace's case on the ground that the facts of the case were identical to the facts in the case before him and held that the amount of Rs 2,26,263 less Rs. 6,920 payable to D. B. Akki & Co., was received by way of compensation and is not a revenue receipt, but a capital receipt and directed that the same be deleted from the assessment.

On appeal by the Department, the Income-Tax Appellate Tribunal allowed the appeal and held that the

said amount was a revenue receipt and not a capital receipt. It was a receipt incidental to the carrying on of the business or profession, because the assessee had no right in law to claim the amount paid by the manufacturing company. It was assumed that the payment has been made for services rendered and that, in the opinion of the Tribunal, it is an additional remuneration received by the assessee for carrying out the work of distributing cigarettes in the past and agreeing to do so in the future. The Shaw Wallace's case was sought to be distinguished on the ground that the payment in that case was made for the cessation of business, while in the present case there had been no such cessation of business. In this view of the matter, it allowed the appeal and disallowed the deduction of Rs. 2,19,343. We may at the outset point out that the assumption by the Tribunal, that the amount received by the assessee was a payment made to it for past services, is not warranted by any material which was before the Tribunal. Sri Srinivasan, learned advocate on behalf of the assessee, submits that the Tribunal was under an erroneous impression that before an amount can be treated as a capital receipt, it should be shown that the assessee had a legal claim to it. He contends firstly, that the amount received is not income and secondly, it is not necessary for the assessee to prove that he had in fact a legal right, the loss of which entitled him to compensation; all that he need show is that the compensation was paid for the loss of a right, not necessarily a legal right, but one which both parties considered to be a right. Lastly, he contends that even if it is treated as an *ex gratia* payment, it is not a revenue receipt.

The first question in this case which has to be resolved is whether the amount received from Vazir Sultan Tobacco Co., Ltd., is a capital receipt or a revenue receipt within the meaning of the Indian Income-tax Act. There are many cases both Indian and English in which compensation for loss of an agency has been held as a capital receipt, and in some cases, particularly in the English cases, the compensation was deemed to be a revenue receipt paid towards loss of profits.

The Indian Income-tax Act nowhere defines income or capital. All it does is to enumerate and describe the various heads of income, profits and gains under s. 6 of the

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Act which is as under:—

> "Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, viz.,:—(i) Salaries; (ii) Interest on securities (iii) Income from property; (iv) Profits and gains of business, profession or vocation; (v) Income from other sources; (vi) Capital gains."

Sections 7 to 12 (B) thereafter, qualify the various heads stated in s. 6. The scheme of taxation under the Act. to put it simply, is that s. 3 makes total income chargeable; s. 4 defines its range; and ss. 6 to 13 lay down the method of computation of the net income of the assessee under the various heads specified under s. 6.

It is obvious that if the amount paid by Vazir Sultan Tobacco Co., Ltd., to the assessee is deemed to be income, it can only be computed under s. 12 as coming under classification (v) of s. 6 "income from other sources." The amount, if it is income, cannot be classified under head (iv) profits and gains of business, because the assessee does not trade in agencies.

We have already pointed out that the Act has not defined income except by way of particularising the categories. In the circumstances, we are forced to take assistance from decided cases. The problem of discriminating between capital receipts and revenue receipts, capital disbursements and revenue disbursements is not an easy task and has given rise to a plethora of case law, both in India and England under the respective Income-tax Acts. The distinction is no doubt well recognised, but the ascertainment, in any particular set of facts and circumstances, of whether a receipt is a revenue receipt or a capital receipt or whether an expenditure is a capital expenditure or revenue expenditure is not easy of resolution, and with Rowlat, J. in *Chibbett* v. *Joseph Robinson & Sons*, 9 T.C. 48 at 60, we may say that "this case like all cases of a similar nature is very troublesome, because all these cases turn upon nice questions of fact." As Lord Macmillan put it so pithily in the case *Van Den Berghs Limited* v. *Clark*, 1935 A.C. 431 at 439: "The reported cases fall into two categories, those in which the subject is found claiming that an item of receipt ought not to be included in computing his profits, and those in which the subject is found claiming that an item of disbursement ought to be included among

the admissible deductions in computing his profits. In the former case, the Crown is found maintaining that the item is an item of income; in the latter, that it is a capital item. Consequently, the argumentative position alternates according as it is an item of receipt or an item of disbursement that is in question, and the tax-payer and the Crown are found alternatively arguing for the restriction or the expansion of the conception of income." In the case before us, we are only concerned with that category of cases dealing with a receipt which the assessee claims not to be included in the income. Although it may not be necessary to refer to the other category of cases dealing with disbursements which were fully considered by us in the case of *D.D. Italia* v. *Commissioner of Income-tax, Hyderabad*, I.L.R. 1953 Hyderabad 273, it may be said that they have a bearing on the question of receipts; because if what is paid once and for all is a capital expenditure, what is received may, in the absence of any indication to the contrary, possess the same character as that of the expenditure.

Under the Indian Income-tax Act all income is taxable unless it is exempt under the Act. The question in each case would be whether a particular amount which is the subject-matter of assessment is income or is a capital receipt or is of an occasional or casual nature.

Sir George Lowndes in *Commissioner of Income-tax* v. *Shaw Wallace & Co.*, 59 I.A. 206 at 212, after pointing out that the object of India Act is to tax income, the term of which it does not define, observed at p. 212: "Income, their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus, income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is often loosely spoken of as 'capital.' But capital, though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production."

The facts in that case were that the assessees were carrying on business in Calcutta as merchants and agents of various companies and had branch offices in different

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parts of India. For a number of years prior to 1928, they acted as distributing agents in India of Burmah Oil Co., and Anglo-Persian Co., but had no formal agreement with either company. In or about the year 1927, the two companies combined and decided to make other arrangements for the distribution of their products. The respondent's agency of the Burmah Oil Co. was accordingly terminated on December 31, 1927 and that of the Anglo-Persian Company on June 30 following. Sometime in the early part of 1928, the Burmah Company paid to the respondent a sum of Rs. 12,00,000 "as full compensation for cessation of the agency" and in August of the same year, the Anglo-Persian Company paid them another sum of Rs. 2,35,000 as "compensation for the loss of their office as agents to the company." The Income-tax Officer took these two receipts into account as profits or gains of their business as assessable income of the respondents for the relevant year, but allowed certain deductions therefrom in respect of compensation paid by the respondents to various employees. The respondents objected to the assessment and appealed. The Calutta High Court held that the receipt by the assessee was not income with which conclusion their Lordships of the Privy Council agreed, but on different grounds.

Their Lordships of the Privy Council in *Kamakshi Narayan Singh* v. *Commissioner of Income-tax, Bihar and Orissa*, 70 I. A. 180, after referring to the definition of income given by Sir George Lowndes in the passage cited above stated that Lord Russel of Killowen in *Captain Maharaj Kumar Gopal Saran Narayan Singh* v. *Commissioner of Income-tax, Bihar and Orissa*, 62 I, A. 207, had in substance repeated it and generally followed and adopted it with this important amplification, namely, "The word 'income' is not limited by the words profits and gains. Anything which can properly be described as income is taxable under the Act unless expressly exempted." Lord Wright, who was delivering the judgment of the Board, observed at page 193 "It is not in their Lordships' opinion correct to regard as an essential element in any of these or like definitions a reference to the analogy of fruit . . . . and . . . it is clear that such picturesque similies cannot be used to limit the true character of income in general and particularly when it is constituted by mining rent or royalties."

It has been strenuously contended by the learned advocate for the Department that the Shaw Wallace's has been disapproved by their Lordships of the Privy Council in Kamakshi Narayan's case. We find no warrant for this assumption. The observation of Sir George Lowndes must be read with reference to the particular facts of the case. Lord Wright, who was dealing with the question whether the mining royalties received by the assessee under an agreement between himself and the mining company was income or capital receipt, was only pointing out that the word income is of the broadest connotation and picturesque similies such as of "income being likened pictorially to the fruit of a tree or the crop of a field" cannot be used to limit the true nature of income in general and particularly when dealing with mining royalties. It is obvious that his Lordship had recognised the difficulty in ascertaining the exact definition of the word "income" under the Income-tax Act which made it necessary to proceed cautiously in applying it to particular cases which differ, because the circumstances, though similar in some respects, may be different in others. No doubt, the definition of income given in the Shaw Wallace's case was considered to be rather narrow and their Lordships of the Supreme Court also held a similar view in *Raghavendra Mills Ltd., Bombay* v. *Commissioner of Income-tax, Bombay City*, A.I.R. 1953 S.C. 4, where Bose, J. observed at p. 6:

> "It is true that the Judicial Committee attempted a narrower definition in *Commissioner of Income-tax* v. *Shaw Wallace & Co.*, 59 I.A. 206, by limiting income to 'a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources' but, in our opinion, those remarks must be read with reference to the particular facts of that case."

The Allahabad High Court in *Hari Kailash & Co.*, v. *Commissioner of Income-tax, Uttar Pradesh, Central Provinces and Berar* 1953 I.T.C. 50, following the Shaw Wallace's case and referring to some of the English cases, viz. *Birch, Beech and Grant Ltd* v. *Reed*, (1939) 2 K.B. 521; *Short Brothers, Ltd* v. *Commissioner of Inland Revenue*, (1927) 12 T.C. 955 and *Kelsall Parsons & Co.* v. *Commissioner of Inland Revenue*, 21 Tax Cases 608; held that there is a difference between compensation or damages paid or received for non-performance of a contract entered

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into in the course of business and compensation or damages paid for the discontinuance of the business itself. The former may be treated as income but the amount paid for terminating a business cannot, ordinarily, be deemed to be income from that business taxable under the Income-tax Act. The distinction as pointed out by Malik, C.J. was that in the one case one gives up the source from which the income arises; in the other one merely gives up anticipated profits, which would have accrued to him if the contract had not been discontinued or terminated, for cash payment. The facts of the case were that the assessee-firm entered into an agreement on the 9th April, 1940, with a limited liability company to finance the business of the limited company for a period of five years, stipulating for an agreed rate of interest and a 60% share of the profits. The business was carried on for more than one year and on 22nd November, 1941 the parties mutually agreed to terminate the agreement by which the assessee-firm was to retain a sum of Rs. 25,962 already in its hand and to receive from the limited company in addition to Rs. 25,000, totalling in all Rs. 50,962, "in lieu of all their claims as regards damages, etc., and share of profits," during the period of "co-operation and future." The whole of Rs. 50,962 was treated by the Income-tax Department as a receipt. The assessee, however, had apportioned Rs. 13,714 as representing his share of profits and the balance of Rs. 37,248 as compensation for the earlier termination of the contract. The Allahabad High Court held on the facts of the case that the compensation paid for the termination of those rights is not taxable and income-tax cannot be charged on that sum.

In *Godrej & Co. v. Commissioner of Income-tax, Bombay City*, (1954) 25 I.T.R. 108, the Bombay High Court was considering the case of an assessee-firm which was the managing agent of a company. The managing agency agreement provided that the assessee should act as the managing agents of the company for a period of 30 years on a remuneration of 20% on the annual net profits of the company and certain further commission if the profits increased. Subsequently, an agreement was arrived at by the parties by which the assessee agreed to receive a lump sum of Rs. 7,50,000 from the company in consideration of the assessee agreeing to accept a flate rate of 10% on the annual net profits of the company for the remaining term of the managing agency. The question was whether the

sum of Rs. 7,50,000 received by the assessee is capital or income. It was held (1) that whatever language the parties might use in order to clothe their transaction, the question for the court must always be what was the real transaction effected by the parties; and (2) that the effect of the agreement was that the assessee was paid a lump sum in consideration of the assessee agreeing to serve the managed company as the managing agents on a reduced salary; the sum of Rs. 7,50,000 represented remuneration paid to the assessee in advance and it was, therefore, income liable to tax. Chagla, C. J., relied upon two English cases, *Hency (H. M. Inspector of Taxes)* v. *Arthur Foster*, (1932) 16 Tax Cases 605; and *Tilley* v. *Wales (Inspecter of Taxes)* (1943) 11 I.T.R. Suppl. 69. In the words of Lord Dundas in the case of *The Glenboig Union Fireclay Co. Ltd.* v. *The Commissioner of Inland Revenue*, 12 I.T.R. 427 at 456, "what we must consider is not the measure by which the amount of compensation was arrived at, but what it was truly paid for." If the decision of the Bombay High Court is considered from this point of view, it would appear to rest on a finding that compensation was paid for the loss of profits. To the same effect were the observations of Chagla, C. J., in the case of *Commissioner of Income-tax and Excess Profits Tax, Bombay City* v. *Shamser Printing Press, Bombay* (1953) I.T.R. 363. Referring to the observations of Lord Buckmaster in the case of Glenboig Fireclay Co., Ltd., his Lordship said at p. 369, "Whatever the test that might be applied, we are more concerned with the quality of the payment rather than the nature of the test applied . . . ." In that case, the premises in which the assessee-firm carried on its business were requisitioned by Collector under r. 75-A (1) of the Defence of India Rules and the assessee was paid a certain sum as compensation. The Income-tax authorities assessed the item described as loss in the business on the ground that it represented loss of profits and was, therefore, profit arising from the assessee's business. On these facts it was held that the payment would either constitute a capital receipt or a casual and non-recurring receipt and was therefore not liable to tax. In the case of *The Commissioner of Income-tax and Excess Profits Tax Madras* v. *The South Indian Pictures Ltd.*, (1951) I.T.R. 605, the assessee, a private limited company, carrying on the business of distribution of films, received a sum of Rs. 26,000 as compensation for the termination of three contracts relating to the distribution of three pictures

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which amount was paid by the producers to the assessee. The Madras High Court held on the facts and circumstances that the sum received by the assessee is not income, profits or gains of the business carried on by the assessee and was not taxable. Satyanarayana Rao, J. after referring to the Shaw Wallace's case, observed at p. 699;

> " . . . . If the department claims to exercise the right of taxing the particular receipt, it must be established that the receipt in question is income, profit or gain falling under any of the heads of the income mentioned in s. 6 of the Act. If it does not fall under any of these heads, the receipt is not taxable and would not be a revenue receipt, for the purpose of Income-tax. It may be casual receipt, or capital receipt. It is unnecessary to express any opinion on the question whether it falls under the one head or the other so long as it is not income, profit or gain which is taxable under s. 10 (1) of the Income-tax Act."

While there can be no exception to these observations, it may be said that if a particular receipt is income, it is bound to fall under one of the heads, for the reason that scheme of the Indian Income-tax Act makes all income taxable unless it is exempted by the provisions thereof.

In view of the observations in the Shaw Wallace's case that their Lordships would discard altogether the case law which has been so painfully evolved in the construction of the English Income-tax Statutes and the flood of other decisions which had been let loose in the Board, we would have hesitated to consider any English authorities but for the fact that the cases we propose to examine are all cases decided after the Shaw Wallace's case and would usefully throw light in determining the nature of the amount received on the termination of an agency or the cancellation of a contract. We are supported by the observations of their Lordships of the Privy Council in Kamakshi Narayan Singh's case where after pointing out that the general frame work and the particular provisions of the Indian Income-tax Act are different from the English Income-tax Acts, making the decisions on the latter acts in general of no assistance in construing the Indian Act said: "But on some fundamental concepts, reference may be to some extent usefully made to English decisions, in particular as to the meaning of the word 'income'." With this

caution, we propose to refer to some of the recent English cases. A broad distinction has been drawn in these cases having regard to the varying circumstances between (a) cancellation of a contract which affects a part of the structure of the assessee involving the loss by him of an enduring trading asset; and (b) the cancellation of a contract which does not affect his trading structure, nor deprive him of any enduring trading asset, but leaves him free to devote his energies and organization released by the cancellation of the contract to replacing the contract which has been lost by other like contracts. As observed by Lord Cooper in *Commissioner of Inland Revenue* v. *Fleming and Co., (Machinery) Ltd.*, 33 T.C. 57 (1951) at p. 61, "it is not possible briefly to formulate the distinction exhaustively or with complete accuracy, as the circumstances may vary infinitely, but a sufficient indication of the relevant considerations is found by contrasting such cases as *Van Den Berghs Ltd.*, 1935 A.C. 431 and *Barr Crombie & Co.*, 1945 S.C. 271, in which the payment was held to be of capital nature with *Short Brothers*, 12 T.C. 1955, and *Kelsall Parsons & Co.*, 1938 S.C. 38, in which the payment was held to be of a revenue nature". Lord Russel also found the same difficulty in formulating a general principle by reference to which in all cases a correct decision could be arrived at, since in each case the question comes to be one of circumstance and degree. In Fleming & Co.'s case a sum of £ 6,710 was paid by the Imperial Chemical Industries Ltd., under the agreement with the assessee company and its directors in the follwing manner, viz., (a) £ 5,320 and £ 800 were paid to the assessee company, the first as compensation towards the relinquishment of an agency of the Imperial Chemical Industries not only in Scotland but United Kingdom and Ireland and the second for assigning to the Imperial Chemical Industries the official stores and magazines which it has utilised; and (b) a sum of £ 590 paid to the directors who undertook jointly and severally to abstain for ten years from entering the explosives industry in Scotland and United Kingdom as sellers, agents or manufacturers. The sum of £ 800 and £ 590 was not treated by the taxation authorities as income and the only question that arose was whether the £ 5,320 paid to the company for the loss of any agency could be treated as revenue payment. It appeared that the company's main business consisted in acquiring agencies of which at one time they held ten and of which at the time of assessment they held seven. The diminution or decrease in

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the number of agencies was treated as a normal incident of their business. It further appeared that the loss of the agency of the Imperial Chemical Industries did not involve any disruption or disorganization of the structure of the company's business. In these circumstances, it was held that the sum of £ 5,320 was compensation for loss of profits and not for loss of a profit-earning asset. In arriving at the conclusion, Lord Cooper clearly stated that his opinion had fluctuated while Lord Keith observed that the amount may seem a large sum for loss of profit for terminating an agency at will but it may reflect the long period of fifty years during which the agency had continued and a desire on the part of the Imperial Chemical Industries Ltd., to act generously. The above observations would sufficiently show the difficulty felt by their Lordships of the Court of Sessions, Scotland, on the facts of the case in arriving at the conclusion that the amount received was a revenue receipt On the basis of this judgment, we are not prepared to accept the contention of the learned advocate for the department that whenever any compensation is paid for termination of an agency at will, that compensation should be deemed to be a payment in lieu of profits, nor is there any justification for his further contention that such a sum should be deemed a payment for past services. The consideration which in our view weighed with their Lordships in that case was that neither the profit making structure was injured nor was there a loss of an enduring trading asset. The nature of the business that the company carried on was such that the diminution or decrease in the number of agencies was a normal incident of its business.

In *Van Den Berghs Ltd.* v. *Clark*, 1935 A.C. 431, an English Company carrying on a very extensive business in manufacture of margarine and other substitutes for butter, entered into an agreement in 1908 with their principal trade rivals, a Dutch company, in the manufacturing of margarine to share profits and losses in proportion, which on an average of five years, the profits of rival trading in margarine bore to each other. In 1913, the former agreement was varied and prolonged until the end of 1940. During the first world war, the agreement could not be observed on either side. In October 1920, a third agreement was entered into by which the former agreements were amended and it was agreed that they should continue in force until the end of 1940. In particular, it was agreed that the

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